POINT of VIEW

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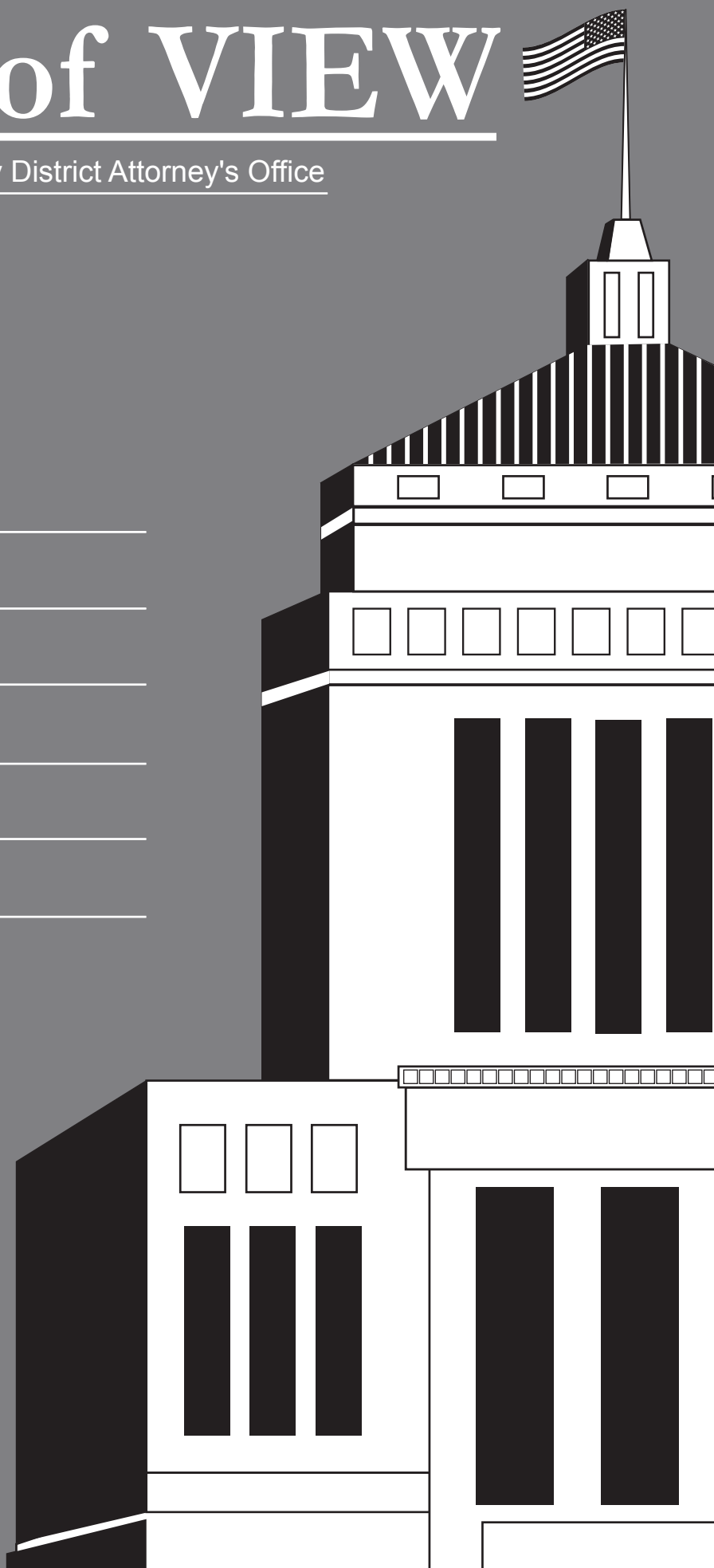
In this issue



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This edition of Point of View
is dedicated to the memory of
Officer Andrew Camilleri Sr.
of the California Highway Patrol
who was killed in the line of duty
on December 24, 2017.

Contents

ARTICLES

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Exigent Circumstances

Police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving.[1]

Most people would probably agree that officers who encounter exigent circumstances should do whatever is reasonably necessary to quickly defuse the situation, including making a forcible entry into a residence. Certainly, most people who pay taxes would insist upon it. And that is, in fact, the law in California and in most states. Except there's a problem: Nobody is quite sure of what the term "exigent circumstances" encompasses.

Over the years, it has been variously defined as a situation in which there is a "compelling need for official action"[2] or a condition in which "real, immediate, and serious consequences will certainly occur,"[3] and an "immediate major crisis."[4] But the most concise and accurate definition was provided by the Seventh Circuit which said that the term "exigent circumstances" is merely "legal jargon" for an "emergency."[5]

In addition to its fuzziness, the number of situations that qualify as exigent circumstances has expanded greatly. At first it was limited to imminent threats to public safety. But over time the courts started employing it in situations where the threatened harm was the destruction of evidence or the apprehension of fleeing suspects.[6]

And then the courts started to recognize an entirely new type of exigent circumstance that became known as "community caretaking" or sometimes "special needs." These are essentially situations that are "totally divorced from the detection, investigation, or acquisition of evidence,"[7] and which also did not rise to the level of a true emergency—and yet the officers believed they needed to act and their belief was objectively reasonable. As the Ninth Circuit observed, the term "exigent circumstances" has become "more of a residual group of factual situations that do not fit into other established exceptions [to the warrant requirement]."[8]

Another change in the law was the establishment of a simpler and more elastic test for determining whether a situation fell into the category of "exigent." It is known as "The Balancing Test," and that is where we will start.

The Balancing Test

In the past, a threat could qualify as an emergency only if officers had *probable cause* to believe it would materialize.[9] The problem with this requirement was that, by focusing on whether there was sufficient proof that a threat existed, the courts would sometimes ignore the overall reasonableness of an officer's belief that a threat existed. They would also sometimes disregard the reasonableness of the manner in which officers responded. For example, a judge who was only interested in whether there was probable cause to believe that some harm was about to occur would overlook such seemingly important circumstances as the magnitude of the threat, the likelihood that the threat would materialize, and whether the officers' response to the situation was proportionate to the threat.

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[1] *Graham v. Connor* (1989) 490 U.S. 386, 397.
[2] *Michigan v. Tyler* (1978) 436 U.S. 499, 509.
[3] *U.S. v. Williams* (6th Cir. 2003) 354 F.3d 497, 503.
[4] *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 766.
[5] *U.S. v. Collins* (7th Cir. 2007) 510 F.3d 697, 699.
[6] See *Ker v. California* (1963) 374 U.S. 38 [fresh pursuit].
[7] *Cady v. Dombrowski* (1973) 413 U.S. 433, 441 [gun in a vehicle].
[8] *Murdock v. Stout* (9th Cir. 1995) 54 F.3d 1437, 1440.
[9] See, for example, *People v. Ray* (1999) 21 Cal.4th 464, 471.

For these reasons, the Supreme Court decided to abandon the probable cause requirement and, as noted, replace it with a type of the balancing test. Specifically, it ruled that a search or seizure pursuant to the exigent circumstances exception to the warrant requirement would be lawful if the need for the officers' response outweighed its intrusiveness.[10] Or, as the Fourth Circuit put it, "As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action."[11]

One important consequence of this test (as opposed to a probable cause requirement) is that if the need for the intrusion was not high, officers might still be able to respond if they could to reduce the intrusiveness to their response.

There is, however, one exception to the rule that probable cause is not required. It pertains to forcible entries into homes which, by their very nature, are so highly intrusive that the need for such a response can outweigh its intrusiveness only if the officers had probable cause to believe the threat would materialize.[12]

The Need for Immediate Action

The first and most important step in applying the balancing test is to assess the strength of the need for an immediate search or seizure. In making this determination, the courts apply the following general principles.

The "reasonable officer" test

In evaluating the significance of a threat—whether it's a threat to a person's life, to an investigation, or to a community caretaking interest—the courts apply the "reasonable officer" test. This means they examine the circumstances from the perspective of the proverbial "reasonable" officer who, while he sometimes makes mistakes, is always able to provide a sensible explanation for his actions.[13] "The core question," said the Second Circuit, "is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer to believe that there was an urgent need to render aid or take action."[14]

Another way to apply this test is to think, "How would the public respond if the threat materialized but I did nothing or waited for a warrant?"[15] As the Court of Appeal put it, "In testing reasonableness of the search, we might ask ourselves how the situation would have appeared if the fleeing gunman armed with a shotgun had shot and possibly killed other officers or citizens while the officers were explaining the matter to a magistrate."[16]

Training and experience

Because an officer's training and experience "can be critical in translating observations into reasonable conclusions,"[17] the courts will also take into account the responding officers' training and experience as it pertains to such matters.

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[10] See *Illinois v. McArthur* (2001) 531 U.S. 326, 331 ["[W]e balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable."]; *Illinois v. Lidster* (2004) 540 U.S. 419, 426 ["[I]n judging reasonableness, we look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."].

[11] *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 224.

[12] See *People v. Lujano* (2014) 229 Cal.App.4th 175, 183 ["But to fall within the exigent circumstances exception to the warrant requirement, an arrest or detention within a home or dwelling must be supported by *both* probable cause *and* the existence of exigent circumstances."]; *U.S. v. Alaimalo* (9th Cir. 2002) 313 F.3d 1188, 1193 ["Even when exigent circumstances exist, police officers must have probable cause to support a warrantless entry into a home."].

[13] See *United States v. Cortez* (1981) 449 U.S. 411, 418; *People v. Ammons* (1980) 103 Cal.App.3d 20, 30.

[14] *U.S. v. Klump* (2nd Cir. 2008) 536 F.3d 113, 117-18.

[15] See *People v. Superior Court (Peebles)* (1970) 6 Cal.App.3d 379, 382 ["One way of testing the reasonableness of the search is to ask ourselves what the situation would have looked like had another bomb exploded, killing a number of people"]; *U.S. v. Black* (9th Cir. 2007) 482 F.3d 1035, 1040 ["the police would be harshly criticized had they not investigated"].

[16] *People v. Bradford* (1972) 28 Cal.App.3d 695, 704.

[17] *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866. Also see *Illinois v. Gates* (1983) 462 U.S. 213, 232.

Reliability of information

Unlike the probable cause test which focuses heavily on the reliability of the information upon which the officer's judgment was made, the balancing test is more flexible . Instead, the importance of reliable information decreases as the need for immediate action increases.[18] Thus, in applying the balancing test in *Florida v. J.L.*, the Supreme Court said, "We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."[19] Similarly, the Eleventh Circuit said that "when an emergency is reported by an anonymous caller, the need for immediate action may outweigh the need to verify the reliability of the caller."[20] It should also be noted that the existence of conflicting information as to the nature or scope of a threat does not necessarily eliminate the need for immediate action.[21]

Magnitude of potential harm

It is not surprising that the most weighty of all the relevant circumstances is the magnitude of the potential harm that might result if the officers delayed taking action. As the Ninth Circuit explained, "[W]hether there is an immediate threat to the safety of the arresting officer or others, the most important factor" is the magnitude of the potential threat.[22] We will discuss this subject later in more detail.

Harm is "imminent"

The courts often say the threat must have been "imminent." But this just means that the officers must have reasonably believed that the threat would have materialized before they would have been able to obtain a warrant.[23] Thus, the Court of Appeal observed, "*Imminent* essentially means it is reasonable to anticipate the threatened injury will occur in such a short time that it is not feasible to obtain a search warrant."[24]

The officers' motivation

The officers' motivation for taking action is unimportant in applying the balancing test in emergency aid and investigative emergency situations because their mental state has nothing to do with the magnitude of the threat or the reasonableness of their response.[25] Thus, in an emergency aid case, *Brigham City v. Stuart,* the Supreme Court said, "It therefore does not matter here whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence."[26]

In community caretaking cases, however, the officers' motivation is significant because the word "caretaking" implies that the officers must have been motivated by a "caretaking" interest. As the California Supreme Court observed, "The defining characteristic of community caretaking functions is that they are totally unrelated to the criminal investigation duties of the police."[27]

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[18] See *People v. Wells* (2006) 38 Cal.4th 1078, 1083; *U.S. v. Wheat* (8th Cir. 2001) 278 F.3d 722, 732, fn.8.
[19] *Florida v. J.L.* (2000) 529 U.S. 266, 273-74.
[20] *U.S. v. Holloway* (11th Cir. 2002) 290 F.3d 1331, 1339.
[21] See *U.S. v. Russell* (9th Cir. 2006) 436 F.3d 1086, 1090 ["Given the substantial confusion and conflicting information, the police were justified in searching the house"].
[22] *Ames v. King County* (9th Cir. 2017) 846 F.3d 340, 348. Also see *Florida v. J.L.* (2000) 529 U.S. 266, 273-74; *Navarette v. California* (2014) __ U.S. __ [134 S.Ct. 1683]; *People v. Coulombe* (2000) 86 Cal.App.4th 52, 58 [report of man with a gun "in a throng of thousands of New Year's Eve celebrants"].
[23] See *People v. Koch* (1989) 209 Cal.App.3d 770, 782; *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1206 ["Implicit in this burden is a showing there was insufficient time to obtain a warrant."]; *Bailey v. Newland* (9th Cir. 2001) 263 F.3d 1022, 1033 ["[T]he presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant"].
[24] *People v. Blackwell* (1983) 147 Cal.App.3d 646, 652.
[25] See *Brendlin v. California* (2007) 551 U.S. 249, 260 [what matters is "the intent of the police as objectively manifested"].
[26] (2006) 547 U.S. 398, 404. Edited.
[27] *People v. Ray* (1999) 21 Cal.4th 464, 471.

Manner of officer's response

Regardless of the nature of the threat, a warrantless search or seizure will not be upheld if the officers did not respond to the threat in a reasonable manner. As the court explained in *People v. Ray*, "The officer's post-entry conduct must be carefully limited to achieving the objective which justified the entry—the officer may do no more than is reasonably necessary to ascertain whether someone is in need of assistance or property is at risk and to provide that assistance or to protect that property."[28]

Nevertheless, a delay is apt to be less significant if officers needed additional time to evaluate the situation or devise an appropriate response.[29] As the California Supreme Court pointed out, "An officer is not required to rush blindly into a potential illicit drug laboratory and possibly encounter armed individuals guarding the enterprise, with no regard for his own safety just to show his good faith belief the situation is emergent."[30]

Having examined the general principles that apply in determining whether exigent circumstances existed, we will now show how those principles are applied by the courts in the three categories of exigent circumstances: (1) imminent threat to a person or property, (2) community caretaking, and (3) investigative emergencies.

Imminent Danger to a Person

The need for rapid police intervention is greatest—and will almost always justify an immediate and intrusive response—when officers reasonably believed it was necessary to eliminate or address an imminent threat to a person's health, safety, or sometimes property. "The most pressing emergency of all," said the Court of Appeal, "is rescue of human life when time is of the essence."[31] Or as the Fourth Circuit put it, "[P]rotecting public safety is why police exist."[32]

PERSON INJURED: That a person in a residence had been injured is not an exigent circumstance. But it becomes one if officers reasonably believed that the person's life or safety were at risk, even if it was not life-threatening. For example, in *Brigham City v. Stuart*[33] police responded to a noise complaint at 3 A.M. and were walking up to the house when, as they passed a window, they saw four adults "attempting, with some difficulty, to restrain a juvenile," at which point the juvenile "broke free and hit one of the adults in the face," causing him to spit blood. The officers immediately opened the screen door, entered the residence and stopped the fight. They also arrested some of the adults for disorderly conduct and contributing to the delinquency of a minor.

The arrestees argued in court that the officers' entry was illegal because there was no significant threat to anyone. Specifically, they claimed that "the injury caused by the juvenile's punch was insufficient to trigger the so-called 'emergency aid doctrine'" because the victim was not knocked unconscious or at least semi-conscious. In rejecting this argument, the Supreme Court pointed out that the "role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."

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[28] (1999) 21 Cal.4th 464, 477.

[29] See *In re Jessie L.* (1982) 131 Cal.App.3d 202, 214 ["The police did not idly sit by during a period in which a warrant could have been obtained, but promptly gathered together a number of officers and went to the locations involved."]; *People v. Stegman* (1985) 164 Cal.App.3d 936, 945 [OK to wait for backup]; *U.S. v. Najar* (10th Cir. 2006) 451 F.3d 710, 719 ["A delay caused by a reasonable investigation into the situation facing the officers does not obviate the existence of an emergency."].

[30] *People v. Duncan* (1986) 42 Cal.3d 91, 104.

[31] *People v. Riddle* (1978) 83 Cal.App.3d 563, 572.

[32] *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 228.

[33] (2006) 547 U.S. 398. Also see *People v. Pou* (2017) 11 Cal.App.5th 143, 149 ["[e]ven a casual review of [*Stuart*] reveals officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid doctrine"].

Note that in *Stuart*, the existence of a threat was based on direct evidence. It most cases, however, it will be based on circumstantial evidence, such as the following:

SICK PERSON: Having learned that one of the occupants of an apartment was "sickly," officers knocked on the door. They could hear several moans or groans from inside, but no one answered the door.[34]

UNRESPONSIVE PERSON: Officers were walking by the open door of a hotel room when they saw a man "seated on the bed with his face lying on a dresser at the foot of the bed." They also saw "a broken, jagged piece of mirror" and "dark balls" which appeared to be heroin.[35]

SHOOTING OUTSIDE A HOME: Although the shooting apparently occurred just *outside* the home, there were bloodstains on the door indicating that "a bleeding victim had come into contact with the door, either by entering or by exiting the residence."[36]

SHOOTING INSIDE A HOME: Officers responded to a report of a shooting inside a house. No one met them when they arrived and the house was dark, but there were two cars in the driveway and the lights outside were on. When no one answered the door, the officers went in through a window.[37]

IRRATIONAL AND VIOLENT: A man inside a motel room appeared to be "irrational, agitated, and bizarre"; he had been carrying two knives; his motel room was "in disarray, with furniture overturned, beds torn apart, and the floor littered with syringes and a bloody rag."[38]

CHILD IN DANGER: An anonymous 911 caller reported that a child was being beaten by her parents; i.e., that it was happening now. When officers arrived they heard a man shouting inside the house, and then the man "bombarded" them with a "slew of profanities."[39]

CHILD IN DANGER: Police received a report of "two small children left" alone at an apartment. No one answered door. A woman arrived and started to enter the apartment. An officer saw "considerable trash and dirty clothes strewn about the kitchen area," and the woman was drunk.[40]

911 hangups

When people need immediate help, they usually call 911. But sometimes people who dial 911 hang up before the call is completed or while the dispatcher is trying to obtain information. In such cases, the 911 operator will have no way of knowing whether the connection was lost because the caller lost consciousness, or because someone was preventing the caller from completing the call, or if the caller was a child who was curious about what happens when someone dials 911. The operator cannot, however, ignore the call. As the Seventh Circuit observed, a "911 system designed to provide an emergency response to telephone tips could not operate if the police had to verify the identity of all callers and test their claim to have seen crimes in progress."[41]

So, how can the responding officers determine whether a 911 hangup constitutes an emergency that would justify a search or seizure? While there are no easy answers, the courts often rule that such a response is justified if the officers saw or heard something upon arrival that was consistent with a call for help. For example, in applying this principle, the courts have noted the following:

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[34] *People v. Roberts* (1956) 47 Cal.2d 374.

[35] *People v. Zabelle* (1996) 50 Cal.App.4th 1282, 1287-88 ["The circumstances justified the officer's belief that defendant might have overdosed on heroin. Thus, his entry into the room to check on defendant's condition was justified."].

[36] *People v. Troyer* (2011) 51 Cal.4th 599, 607. Also see *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1013.

[37] *People v. Soldoff* (1980) 112 Cal.App.3d 1.

[38] *U.S. v. Arch* (7th Cir. 1993) 7 F.3d 1300, 1304-5.

[39] *Schreiber v. Moe* (6th Cir. 2010) 596 F.3d 323, 330-31.

[40] *People v. Sutton* (1976) 65 Cal.App.3d 341.

[41] *U.S. v. Wooden* (7th Cir. 2008) 551 F.3d 647, 650.

- "[The] combination of a 911 hang call, an unanswered return call, and an open door with no responses from within the residence is sufficient to satisfy the exigency requirement."[42]
- "Even more alarming, someone was answering the phone but immediately placing it back on the receiver."[43]
- An "hysterical" man phoned the police at 5 A.M. and shouted, "Get the cops here now!" After the man gave his address, the phone was disconnected; the front door was ajar.[44]
- The woman who answered the door for the responding officers was nervous and gave them "obviously false statements," which led them to believe "she had been threatened or feared retaliation should she give honest answers."[45]

Domestic violence

On the subject of domestic violence calls, the Ninth Circuit noted that their volatility makes them "particularly well-suited for an application of the emergency doctrine."[46] Thus, in *Tierney v. Davidson* the Second Circuit said, "Courts have recognized the combustible nature of domestic disputes, and have accorded great latitude to an officer's belief that warrantless entry was justified by exigent circumstances when the officer had substantial reason to believe that one of the parties to the dispute was in danger."[47]

Still, as in 911 hangup cases, the courts seem to require some additional suspicious or corroborating circumstance before officers may enter without a warrant. "We do not suggest," said the Ninth Circuit, "that domestic abuse cases create a per se exigent need for warrantless entry; rather, we must assess the total circumstances, presented to the law officer before a search, to determine if exigent circumstances relieved the officer of the customary need for a prior warrant."[48]

For example, in *People v. Pou*[49] LAPD officers responded to a report of a "screaming woman" at a certain address. When they arrived, they could hear the "very loud" sound of people arguing. The officers knocked and announced several times, but no one responded. Finally, a man opened and door and the officers told him that they needed "to come in and look at the apartment to make sure everybody was okay." When the man refused to admit them, they entered and conducted a protective sweep. "Under these circumstances," said the court, "it was objectively reasonable for an officer to believe that immediate entry was necessary to render emergency assistance to a screaming female victim inside or to prevent a perpetrator from inflicting additional immediate harm to that victim or others inside the house."

Similarly, in *People v. Higgins*[50] officers were dispatched at 11 P.M. to an anonymous report of a domestic disturbance involving "a man shoving a woman around." No one responded to their knocking, but they saw a man inside the residence and then heard a "shout." They knocked again, and a

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[42] *Johnson v. City of Memphis* (6th Cir. 2010) 617 F.3d 864, 869. Also see *Hanson v. Dane County* (7th Cir. 2010) 608 F.3d 335, 337 ["A lack of an answer on the return of an incomplete emergency call implies that the caller is unable to pick up the phone—because of injury, illness (a heart attack, for example), or a threat of violence."]. Compare *U.S. v. Martinez* (10th Cir. 2011) 643 F.3d 1292, 1297-98 [a 911 call in which the dispatcher hears only static does not warrant the same concern as a call in which the caller hung up].

[43] *U.S. v. Najar* (10th Cir. 2006) 451 F.3d 710, 720.

[44] *U.S. v. Snipe* (9th Cir. 2008) 515 F.3d 947.

[45] *Hanson v. Dane County* (7th Cir. 2010) 608 F.3d 335, 338.

[46] *U.S. v. Martinez* (9th Cir. 2005) 406 F.3d 1160, 1164. Also see *Tierney v. Davidson* (2nd Cir. 1998) 13 F.3d 189, 197 [the courts "have recognized the combustible nature of domestic disputes, and have accorded great latitude to an office's belief that warrantless entry was justified by exigent circumstances."].

[47] (2nd Cir. 1998) 133 F.3d 189, 197.

[48] *U.S. v. Brooks* (9th Cir. 2004) 367 F.3d 1128, 1136.

[49] (2017) 11 Cal.App.5th 143, 152.

[50] (1994) 26 Cal.App.4th 247.

woman answered the door. "She was breathing heavily and appeared extremely frightened, afraid, very fidgety, and very nervous." The officers also noticed a "little red mark" under one eye and "slight darkness under both eyes." The woman tried to explain away the officers' concern by saying that she was injured when she fell down some stairs, and that the noise from the fall might have prompted someone to call the police. When she said that her boyfriend had left, they knew she was lying (because they heard him "shout"), at which point they forcibly entered. In ruling the entry was lawful, the court noted that the woman "was extremely frightened and appeared to have been the victim of a felony battery. Moreover, [she] lied about being alone and gave the officers a suspicious story about having fallen down the stairs."

In *Pou* and *Higgins* the officers had clearly seen and heard enough to reasonably believe that an immediate entry was justified by exigent circumstances. In many cases, however, the responding officers will have nothing more that a report of domestic violence from a 911 caller. Although some additional suspicious circumstance is ordinarily necessary before the officers may forcibly enter a home based on that alone, the courts have ruled that a 911 call may, in and of itself, justify a less intrusive response, such as trespassing. This is because it is common knowledge that 911 calls are traced and recorded, and therefore people who phone 911 instead of a non-emergency line are (at least to some extent) leaving themselves exposed to identification even if they gave a false name or refused to identify themselves.[51] As the Supreme Court pointed out, "A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity."[52]

For example, in *U.S. v. Cutchin* the D.C. Circuit upheld a car stop based solely on a 911 report that the driver had a sawed-off shotgun and a .38 caliber pistol at his side. In such cases, said the court, so long as the caller did not appear to be unreliable, "a dispatcher may alert other officers by radio, who may then rely on the report, even though they cannot vouch for it."[53]

Missing persons

The courts have usually upheld forcible entries into a home for the purpose of locating a missing person when (1) the officers reasonably believed the report was reliable, (2) the circumstances surrounding the disappearance were sufficiently suspicious, and (3) there was reason to believe that an immediate warrantless entry was necessary to confirm or dispel their suspicions. Two examples:

In *People v. Rogers*[54] a woman notified San Diego police that a friend named Beatrice had been missing, that she was living with Rogers in an apartment complex that he managed and, even though Beatrice had been missing for three weeks, Rogers had refused to file a missing person report. In addition, she had previously heard Rogers threaten to lock Beatrice in a storage room in the basement.

An investigator phoned Rogers who claimed that Beatrice had been missing for only a week or so, at which point Rogers said he "had to go," and quickly hung up. Later that day, the investigator and uniformed officers went to the apartment and spoke with Rogers who claimed that Beatrice might have gone to Mexico "with someone." The investigator asked if he could look in the storage room just to confirm that she was not being held there. At that point, Rogers' "neck started to visibly throb" and he said no. The investigator then forcibly entered and found Beatrice's remains. Rogers was charged with

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[51] See *People v. Brown* (2015) 61 Cal.4th 968, 982 [a call to 911 constitutes "[a]nother indicator of veracity"]; *People v. Dolly* (2007) 40 Cal.4th 458, 467 ["[M]erely calling 911 and having a recorded telephone conversation risks the possibility that the police could trace the call or identify the caller by his voice."].

[52] *Navarette v. California* (2014) __ U.S. __ [134 S.Ct. 1683, 1689].

[53] (D.C. Cir. 1992) 956 F.2d 1216, 1217.

[54] (2009) 46 Cal.4th 1136.

her murder. In ruling that the entry was justified, the court pointed out, among other things, Rogers' "noticeable lack of concern over the whereabouts of his child's mother" and his "physical reaction" when the investigator mentioned his threat to lock Beatrice in the storage room.

In *People v. Macioce,*[55] some friends of Mr. and Mrs. Macioce notified San Jose police that the couple was missing. The friends were especially concerned because the Macioces missed a regular church meeting which they usually attended, and also because Mr. Macioce failed to appear for a knee operation. They also said the Macioce's car was parked in the carport but, during the past two days, they had knocked on the door of the house several times but no one responded and the mail was piling up. When the officers also received no response at the front door, they entered the apartment and discovered the body of Mr. Macioce who, as it turned out, had been killed by Mrs. Macioce. In rejecting Mrs. Macioce's motion to suppress everything in the house (including her husband's corpse) the court said the warrantless entry "was eminently reasonable."

Drug labs

An illegal drug lab in a home or business will constitute an exigent circumstance if officers were aware of facts that reasonably indicated that it posed an imminent threat.[56] This requirement is automatically satisfied if officers reasonably believed that the lab was being used to manufacture meth or PCP because the chemicals used to produce these substances tend to explode.[57]

What about the odor of ether? It is arguable that any detectible odor of ether coming from a home constitutes an exigent circumstance because ether is highly volatile.[58] For example, in *People v. Stegman*,[59] in which the odor was detected two houses away, the court said, "Ether at such high levels of concentration would be highly dangerous regardless of purpose, thus constituting an exigent circumstance."

Dead bodies

Officers who respond to a report of a dead body inside a home or other place are not required to assume that the reporting person was able to make a medical determination that the person was deceased. Consequently, they may enter the premises to confirm.[60] As the D.C. Circuit observed, "Acting in response to reports of dead bodies, the police may find the 'bodies' to be common drunks, diabetics in shock, or distressed cardiac patients. Even the apparently dead are often saved by swift police response."[61]

If officers detect the odor of a decaying body coming from the premises, it has been held that if one person is dead under suspicious circumstances, it is not unreasonable for officers to enter to make

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[55] (1987) 197 Cal.App.3d 262.

[56] See *People v. Duncan* (1986) 42 Cal.3d 91, 103 ["[T]here is no absolute rule that can accommodate every warrantless entry into premises housing a drug laboratory . . . the emergency nature of each situation must be evaluated on its own facts."].

[57] See *People v. Duncan* (1986) 42 Cal.3d 91, 105 ["The extremely volatile nature of chemicals, including ether, involved in the production of drugs such as PCP and methamphetamine creates a dangerous environment"]; *People v. Messina* (1985) 165 Cal.App.3d 937, 943 ["[T]he types of chemicals used to manufacture methamphetamines are extremely hazardous to health."]; *U.S. v. Cervantes* (9th Cir. 2000) 219 F.3d 882, 891-91 ["sickening chemical odor" that "might be associated with methamphetamine production"].

[58] See *People v. Osuna* (1986) 187 Cal.App.3d 845, 852 [expert witness "stressed that the primary danger associated with ethyl ether anhydrous is flammability. Its vapors are capable of traveling long distances and can be ignited by a gas heater, a catalytic converter or a car, a cigarette"].

[59] (1985) 164 Cal.App.3d 936.

[60] See *People v. Wharton* (1991) 53 Cal.3d 522, 578 ["Because there existed the possibility that the victim was still alive, we cannot fault the officers' decision to investigate further."]; *U.S. v. Richardson* (7th Cir. 2000) 208 F.3d 626 [officers testified that "laypersons without medical knowledge are not in a position to determine whether a person is dead or alive"].

[61] *Wayne v. U.S.* (D.C. Cir. 1963) 318 F.2d 205, 213, 241.

sure there is no one on the premises who might be saved. Said the Ninth Circuit, "[A] report of a dead body can easily lead officers to believe that someone might be in need of immediate aid."[62] Note that the coroner has a legal right to enter to examine the body and take other action required by law.[63]

Investigative Threats

Although there is no "crime scene" exception to the warrant requirement, the courts have consistently recognized an exception in situations where there existed an imminent threat that evidence of a crime would be destroyed or corrupted, or that a suspect was, or will soon be, in flight.[64]

The lawfulness of a search based on such a threat—an "investigative emergency"—is technically determined by employing the same balancing test that is used in the other exigent circumstances; i.e., it is lawful if the need for the action exceeded its intrusiveness. As a practical matter, however, the restrictions on investigative threats are greater because the officers' objective is to protect a law enforcement interest as opposed to a threat to the general public (although these threats are not necessarily mutually exclusive).

The primary restriction on investigative threats pertains to warrantless entries into homes. In these cases the courts still apply the balancing test, but they generally require that the need portion of the test be supported by *probable cause*.[65] Although. as noted earlier, probable cause is not required when the emergency entry into a home was based on an imminent threat to people or property, most courts consider it an absolute requirement when the only objective is to defuse a threat that is based solely on a law enforcement interest.[66] Moreover, the courts are generally not apt to uphold an intrusion based on destruction of evidence or "fresh" pursuit unless the crime under investigation was especially serious.[67] (As we will discuss later, the seriousness of the crime is not an important factor when officers are in "hot" pursuit.)

Destruction of evidence

Probably the most common investigative emergency is a threat that certain evidence would be destroyed if officers waited for a warrant.[68] This is because a lot of evidence can be destroyed quickly, and its destruction is a top priority for most criminals when they think the police are closing in. There are, however, three requirements that must be met to invoke this exigent circumstance:

(1) **EVIDENCE ON PREMISES:** Officers must have had probable cause to believe there was destructible evidence on the premises.[69] In the absence of direct proof, probable cause may be based on logical inference. For example, people

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[62] *U.S. v. Stafford* (9th Cir. 2005) 416 F.3d 1068, 1074 ["[A] report of a dead body can easily lead officers to believe that someone might be in need of immediate aid."].

[63] See *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1023; Gov. Code, §§ 27491.1, 27491.2.

[64] See *Illinois v. McArthur* (2001) 531 U.S. 326, 330; *Mincey v. Arizona* (1978) 437 U.S. 385, 392 [no "crime scene" exception].

[65] See *People v. Lujano* (2014) 229 Cal.App.4th 175, 183 ["But to fall within the exigent circumstances exception to the warrant requirement, an arrest or detention within a home or dwelling must be supported by *both* probable cause *and* the existence of exigent circumstances."]; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1399.

[66] See *People v. Troyer* (2011) 51 Cal.4th 599, 607 ["We decline to resolve here what appears to be a debate over semantics. Under either approach [i.e., reasonableness vs. probable cause] our task is to determine whether there was an objectively reasonable basis [for the entry]."]; *U.S. v. Alaimalo* (9th Cir. 2002) 313 F.3d 1188, 1193 ["Even when exigent circumstances exist, police officers must have probable cause to support a warrantless entry into a home."].

[67] See *People v. Herrera* (1975) 52 Cal.App.3d 177, 182 [the more serious the crime, "the greater the governmental interest in its prevention and detection"]; *People v. Higgins* (1994) 26 Cal.App.4th 247, 252 ["If the suspected offense is extremely minor, a warrantless home entry will almost inevitably be unreasonable under the Fourth Amendment."].

[68] See *Kentucky v. King* (2011) 563 U.S. 452, 460 ["to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search"]; *Missouri v. McNeely* (2013) __ U.S. __ [133 S.Ct. 1552, 1559].

[69] See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32; *People v. Thompson* (2006) 38 Cal.4th 811, 820-22.

who commit certain crimes (such a drug dealers) usually possess certain instrumentalities or fruits of the crime, and they usually keep these things in their home, car, or other relatively safe place.[70]

(2) **JAILABLE CRIME**: Although the crime under investigation need not be "serious" or even a felony,[71] it must carry a potential jail sentence.[72]

(3) **IMPENDING DESTRUCTION**: Officers must have been aware of some circumstance that reasonably indicated the suspect or someone else was about to destroy the evidence.[73] Thus, the mere possibility of destruction does not constitute an exigent circumstance.[74]

A common indication that evidence was about to be destroyed is that, upon arrival to execute a search warrant, the officers saw or heard a commotion inside the residence which, based on the their training and experience, was reasonably interpreted as indicating the occupants were destroying evidence or were about to start.[75] For example, in *People v. Ortiz* two officers who were walking past an open door to a hotel room saw a woman "counting out heroin packages and placing them on a table." The officers then entered without a warrant and court ruled the entry was lawful because:

> Viewed objectively, these facts were sufficient to lead a reasonable officer to believe that defendant or the woman saw, or might have seen, the officers. Since it is common knowledge that those who possess drugs often attempt to destroy the evidence when they are observed by law enforcement officers, it was reasonable for [the officer] to believe the contraband he saw in front of defendant and the woman was in imminent danger of being destroyed.[76]

Some other examples:

- After knocking, the officers "heard noises that sounded like objects being moved."[77]
- After the officers knocked and announced, the suspect "disappeared behind the curtains, and the officers heard a shuffling of feet and the sound of people moving quickly about the apartment."[78]
- When an occupant opened the door and saw that the callers were officers, he immediately attempted to slam the door shut.[79]
- After the officers knocked and announced, the suspect opened the door but immediately slammed it shut when she was informed that her accomplice had consented to a search. The officers then "heard footsteps running away from the door, a faucet turn on, and drawers being banged open and closed." Said the court, "These are classic signs indicating destruction of evidence."[80]
- Another "classic" sign is the "repeated flushing of the toilet behind the locked door of the bathroom in premises where [drugs are] being kept and the police are at the threshold."[81]

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[70] See *People v. Senkir* (1972) 26 Cal.App.3d 411, 421; *People v. Farley* (2009) 46 Cal.4th 1053, 1099.
[71] See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32.
[72] See *Illinois v. McArthur* (2001) 531 U.S. 326, 336; *People v. Torres* (2012) 205 Cal.App.4th 989, 995.
[73] See *People v. Koch* (1989) 209 Cal.App.3d 770, 782; *Ferdin v. Superior Court* (1974) 36 Cal.App.3d 774, 782.
[74] See *Richards v. Wisconsin* (1997) 520 U.S. 385, 391; *People v. Bennett* (1998) 17 Cal.4th 373, 384; *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1209 ["Where the emergency is the imminent destruction of evidence, the government agents must have an objectively reasonable basis for believing there is someone inside the residence who has reason to destroy the evidence."].
[75] See *U.S. v. Moreno* (2nd Cir. 2012) 701 F.3d 64, 75; *Richards v. Wisconsin* (1997) 520 U.S. 385, 396.
[76] *People v. Ortiz* (1995) 32 Cal.App.4th 286, 293.
[77] *People v. Seaton* (2001) 26 Cal.4th 598, 632.
[78] *People v. Hill* (1970) 3 Cal.App.3d 294, 299-300.
[79] *People v. Baldwin* (1976) 62 Cal.App.3d 727, 739.
[80] *U.S. v. Andino* (2nd Cir. 2014) 768 F.3d 94, 100-101.
[81] *People v. Clark* (1968) 262 Cal.App.2d 471, 475.

It might also be reasonable to believe that a suspect inside the house would destroy evidence if there was reason to believe that he had just learned, or would quickly learn, that an accomplice or co-occupant had been arrested and would therefore have reason to cooperate with officers.[82] As the D.C. Circuit explained, "[T]he police will have an objectively reasonable belief that evidence will be destroyed if they can show they reasonably believed the possessors of the contraband were aware that the police were on their trail."[83]

Thus, in *People v. Freeny* the court concluded that narcotics officers in Los Angeles reasonably believed that the suspect's wife would destroy drugs in the house because she was inside and her husband had just been arrested some distance away after selling drugs to an undercover officer. Said the court, "No reasonable man could conclude other than that Mrs. Freeny would destroy evidence of her guilt, which was equal to that of appellant, if she learned of his arrest."[84]

Note, however, that even if there existed a threat of imminent destruction, a warrantless entry or search will not be upheld if the officers said or did something before entering that they knew, or should have known, would have provided the occupants with a motive to destroy evidence immediately; e.g., an officer without a warrant said "open the door or we'll break it open."[85] Also, in most cases the evidence can be sufficiently protected by securing the premises while seeking a warrant.

Hot pursuits

In the context of exigent circumstances, a "hot" pursuit occurs when (1) officers had probable cause to arrest the suspect, (2) the arrest was "set in motion" in a public place (which includes the doorway of the arrestee's home), and (3) the suspect responded by retreating into his home or other private place. When this happens, officers may pursue him inside because, said the Supreme Court, "a suspect may not defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place."[86]

For example, in the case of *U.S. v. Santana,*[87] officers in Philadelphia went to Santana's house to arrest her because she had just sold drugs to an undercover officer. As they arrived, they saw her standing at the doorway. She saw them too, and ran inside. After they entered and arrested her, the officers seized evidence in plain view which Santana thought should be suppressed. The Supreme Court disagreed, ruling that officers in "hot" pursuit do not need to terminate a chase when the suspect flees into a residence. Some other examples:

- Responding to a report of a domestic dispute, officers found the victim outside her home. Her face and nose were red and she was "crying uncontrollably." She said her husband, who was inside the house, had "hit her a few times in the face." The husband opened the door when the officers knocked but, seeing the officers, tried to close it. The officers went in.[88]
- While staking out a stolen car, an officer saw a known auto burglar walk up to the driver's side and reach down "as if to open the door." When the burglar saw the officer, he ran into his home nearby. The officer chased him inside and arrested him.[89]
- An officer who was investigating a report of a "very strong odor of ether" coming from an apartment, saw Luna step out of the apartment. Luna appeared to be under the influence

[82] See *Illinois v. McArthur* (2001) 531 U.S. 326, 332 [suspect knew that his wife was cooperating with officers and they reasonably could have concluded that he would, if given the chance, get rid of the drugs fast].
[83] *U.S. v. Socey* (D.C. Cir. 1988) 846 F.2d 1439, 1445, fn.6.
[84] (1974) 37 Cal.App.3d 20, 33. Also see *U.S. v. Ramirez* (8th Cir. 2012) 676 F.3d 755, 764.
[85] *Kentucky v. King* (2011) 563 U.S. 452, 469 ["the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment"].
[86] *United States v. Santana* (1976) 427 U.S. 38, 43. Edited.
[87] (1976) 427 U.S. 38.
[88] *People v. Wilkins* (1993) 14 Cal.App.4th 761.
[89] *People v. Superior Court (Quinn)* (1978) 83 Cal.App.3d 609, 615-16.

of PCP. When the officer ordered her to "come down the stairs," Luna went back into the apartment and closed the door. The officer went in after her.[90]

- An officer attempted to make a traffic stop on Lloyd who disregarded the officer's red light and siren, drove home and ran inside. They went inside and arrested him.[91]

Note that while the other investigative emergencies can be invoked only if the crime under investigation was especially serious, this requirement does not apply to hot pursuits. As the Supreme Court explained, "Where the pursuit into the home was based on an arrest set in motion in a public place, the fact that the offenses justifying the initial detention or arrest were misdemeanors is of no significance in determining the validity of the entry without a warrant."[92]

Finally, a suspect who runs from officers triggers the "hot" pursuit exception even though the crime occurred at an earlier time. Thus, the courts have ruled that a hot pursuit "need not be an extended hue and cry in and about the public streets,"[93] but it must be "immediate or continuous."[94] For example, in *People v. Patino*,[95] LAPD officers were dispatched late at night to a silent burglary alarm at a bar. As they arrived, they saw a man "backing through the front door carrying a box." When the man saw the officers, he dropped the box and escaped. About an hour later, the officers saw him again and resumed the chase. When the man ran into an apartment, the officers went in after him and encountered Patino who was eventually arrested for obstruction. Patino contended that the officers' entry was unlawful, but the court disagreed because "[t]he facts demonstrate that the officers were in hot pursuit of the burglary suspect even though an hour had elapsed after they were first chasing the suspect."

"Fresh" pursuits

Unlike "hot" pursuits, "fresh" pursuits are not physical chases. Instead, they are pursuits in the sense that officers with probable cause are actively attempting to apprehend the suspect and, in doing so, are quickly responding to developing information as to his whereabouts; and eventually that information adds up to probable cause to believe that he is presently inside his home or other private structure.[96] The cases indicate that an entry based on "fresh pursuit" will be permitted if the following circumstances existed:

(1) **Serious felony**: The crime under investigation must have been a serious felony, usually a violent one.[97]

(2) **Diligence**: At all times the officers must have been diligent in their attempt to apprehend the perpetrator.[98]

(3) **Suspect located**: The officers must have developed probable cause to believe that the perpetrator was presently inside a certain house or structure.[99]

(4) **Evidence of flight**: Officers must have reasonably believed that the perpetrator was in active flight or soon would be.

In some cases, an officer's belief that a suspect is fleeing will be based on direct evidence. An example is found in *People v. Lopez* where LAPD

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[90] *People v. Abes* (1985) 174 Cal.App.3d 796.
[91] *People v. Lloyd* (1989) 216 Cal.App.3d 1425.
[92] *Stanton v. Sims* (2013) __ U.S. __ [134 S.Ct. 3, 4]. Also see I*n re Lavoyne M.* (1990) 221 Cal.App.3d 154, 159.
[93] *United States v. Santana* (1976) 427 U.S. 38, 43.
[94] *Welsh v. Wisconsin* (1984) 466 U.S. 740, 743. Also see *White v. Hefel* (7th Cir. 2017) 875 F.3d 350, 356 ["the police did not lose track of [the suspect] for any signficant time"].
[95] (1979) 95 Cal.App.3d 11.
[96] See *People v. Escudero* (1979) 23 Cal.3d 800, 808.
[97] See *Minnesota v. Olson* (1990) 495 U.S. 91, 100; *People v. Escudero* (1979) 23 Cal.3d 800, 811.
[98] See *People v. Williams* (1989) 48 Cal.3d 1112, 1139 ["no unjustified delay"].
[99] See *People v. Benton* (1978) 77 Cal.App.3d 322, 327; *People v. Smith* (1966) 63 Cal.2d 779, 797.

officers learned that a murder suspect was staying at a certain motel, and that someone would soon be delivering money to him so that he could escape to Texas.[100] In most cases, however, evidence of flight will be based on circumstantial evidence. Examples include seeing a fresh trail of blood leading from a murder scene to the suspect's house,[101] and knowing that a violent parolee-at-large was trying to avoid arrest by staying at different homes.[102]

In some cases, the fact that the suspect had recently committed a serious felony may also justify the conclusion that he is in active flight. This is because the perpetrator of such a crime will expect an immediate, all-out effort to identify and apprehend him. The length of such an effort will vary depending on the seriousness of the crime and the number of leads. In any event, if during this time officers developed probable cause to believe the perpetrator was inside his home or other place, a warrantless entry will usually be justified under the "fresh" pursuit doctrine. Examples:

- At 8 A.M., Hayden robbed a Baltimore cab company employee at gunpoint. As he left, someone in the office yelled "holdup," and two cab drivers in the vicinity heard this, saw Hayden, and followed him to his home nearby. Police were alerted, arrived quickly, entered and arrested Hayden. Court: "The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given."[103]
- The body of a young woman was discovered at 5:20 A.M. along a road in Placer County. She had been raped, robbed, and murdered. Sheriff's detectives quickly identified the woman and developed probable cause to believe that Williams was the perpetrator. The next day, they found the victim's stolen car near the apartment of Williams' girlfriend. They entered the apartment and arrested him. In ruling the arrest was lawful under the "fresh" pursuit doctrine, the court noted that the investigation proceeded steadily and diligently from the time the body was discovered and that "[t]he proximity of the victim's car clearly suggested defendant's presence in the apartment, and also made flight a realistic possibility."[104]
- Gilbert killed a police officer in Alhambra during a botched bank robbery. He and one of his accomplices, King, got away but, unknown to them, a third accomplice named Weaver was captured a few minutes later. Weaver identified Gilbert as the shooter and told officers where he lived. While en route to the apartment, officers learned that King had just left the apartment. Figuring that Gilbert was still inside, officers forcibly entered. Although Gilbert was not there, officers found evidence in plain view. During a suppression hearing, one of the officers testified that "we knew . . . there were three robbers. One was wounded and accounted for, one had just left a few minutes before, and there was a third unaccounted for. Presumably he was in the apartment." The court responded, "Since the officers were in fresh pursuit of two robbers who escaped in the same automobile, [the officer's] assumption was not unreasonable. The officers entered, not to make a general exploratory search to find evidence of guilt, but in fresh pursuit to search for a suspect and make an arrest. A police officer had been shot, one suspect was escaping, and another suspect was likely to escape."[105]

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[100] (1979) 99 Cal.App.3d 754, 766.
[101] *People v. McDowell* (1988) 46 Cal.3d 551.
[102] *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 362.
[103] *Warden v. Hayden* (1967) 387 U.S. 294, 298.
[104] *People v. Williams* (1989) 48 Cal.3d 1112.
[105] *People v. Gilbert* (1965) 63 Cal.2d 690.

Community Caretaking

As noted earlier, the role of law enforcement officers in the community has grown over the years. In fact, it now includes an "infinite variety of services,"[106] that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[107] Sometimes the responding officers determine that they cannot resolve the matter unless they enter or maybe even search a home, business, or car. Can they do so without a warrant?

In the past, the answer was usually no because there was no demonstrable threat to life or property.[108] But as time went on, cases started cropping up in which the courts would acknowledge that, despite the absence of a true emergency, they could not fault the officers for intervening. Some of these courts avoided issue by invoking the "harmless error" or "inevitable discovery" rules, or saying that a true emergency existed even though it obviously didn't. Others would rule that the search was illegal and that the evidence must be suppressed but, at the same time, they would say something like, "I don't think that the officers were wrong in what they did. In fact, I commend them."

Over time, however, the courts started confronting the issue. One of the first to do so was the California Supreme Court which, in *People v. Ray,* pointed out many people nowadays "do not know the names of [their] next-door neighbors" and that "tasks that neighbors, friends or relatives may have performed in the past now fall to the police." And, said the court, there would be "seriously undesirable consequences for society at large" if officers were required to explain to the reporting person, "Sorry. We can't help you. We need a warrant but can't get one because there's no 'crime.'"[109]

This is why the courts now recognize the relatively new exigent circumstance that has become known as "community caretaking" or "special needs."[110] Examples of typical community caretaking situations include "check the welfare calls," clearing vehicle accidents, looking for lost children and, recently, trying to corral a loose horse.[111]

CARETAKING VS. EXIGENT CIRCUMSTANCES: Although some courts have suggested that community caretaking and exigent circumstances are separate concepts, they are not. On the contrary, they are both (1) based on a situational and readily-apparent need that can only be met, or is traditionally met, by law enforcement officers; and (2) are subject to the same balancing test: the police action is lawful if the need for it outweighed its intrusiveness.

There are, however, three significant differences between community caretaking and exigent circumstances. First, community caretaking situations are, by definition, not as dangerous as traditional exigent circumstances.[112] This means that searches and seizures based on community caretaking will ordinarily be upheld only if the officers' response was relatively nonintrusive. Second, an intrusion based on a community caretaking interest may be deemed unlawful if the court finds that the officers' sole motivation was to make an arrest or obtain evidence.[113] As the California Supreme Court explained, "[C]ourts must be especially vigilant in guarding against subterfuge, that is, a false reliance upon the personal safety or property protection rationale when the real purpose was to seek out evidence of crime."[114]

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[106] *U.S v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 784-85.
[107] *Cady v. Dombrowski* (1973) 413 U.S. 433, 441.
[108] See, for example, *People v. Smith* (1972) 7 Cal.3d 282, 286.
[109] *People v. Ray* (1999) 21 Cal.4th 464, 472, 480. Also see *U.S. v. Rohrig* (6th Cir. 1996) 98 F.3d 1506, 1519.
[110] See *Cady v. Dombrowski* (1973) 413 U.S. 433, 441; *People v. Ray* (1999) 21 Cal.4th 464, 472; *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 785.
[111] *People v. Williams* (2017) 15 Cal.App.5th 111.
[112] See *People v. Ray* (1999) 21 Cal.4th 464, 476-77; *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 785.
[113] See *People v. Morton* (2004) 114 Cal.App.4th 1039, 1047; *U.S. v. Orozco* (9th Cir. 2017) 858 F.3d 1204, 1216.
[114] *People v. Ray* (1999) 21 Cal.4th 464, 477.

Third, unlike police actions that are based on exigent circumstances, officers are not expected to respond to every situation that could be justified by a community caretaking interest. As the New York Court of Appeals explained:

> [W]e neither want nor authorize police to seize people or premises to remedy what might be characterized as minor irritants. People sometimes create cooking odors or make noise to the point where neighbors complain. But as we live in a free society, we do not expect the police to react to such relatively minor complaints by breaking down the door.[115]

Still, it may happen occasionally that the officers cannot just ignore the problem just because it might be classified as a "minor irritant." For example, in *U.S. v. Rohrig*[116] officers responded to a report of loud music coming from Rohrig's house. The time was 1:30 A.M., and the music was so loud that the officers could hear it about a block away. As they pulled up, several "pajama-clad neighbors emerged from their homes to complain about the noise." The officers knocked on Rohrig's door and "hollered to announce their presence" but no one responded. Having no apparent alternatives (other than leaving the neighbors at the mercy of Rohrig's thunderous speakers), the officers entered the house through an unlocked door and saw wall-to-wall marijuana plants. Not only did the court rule that the officers' response was appropriate, it noted the absurdity of prohibiting them from assisting the neighbors:

> [I]f we insist on holding to the warrant requirement under these circumstances, we in effect tell Defendant's neighbors that "mere" loud and disruptive noise in the middle of the night does not pose "enough" of an emergency to warrant an immediate response, perhaps because such a situation 'only' threatens the neighbors' tranquility rather than their lives or property. We doubt that this result would comport with the neighbors' understanding of "reasonableness."

Intrusiveness of Response

So far we have been discussing how the courts determine the strength of the need to enter a residence or take other action in response to an exigent circumstance. Now, having determined the importance of taking action, the courts must weigh this circumstance against the intrusiveness of the officers' actions. And if the need was equal to or greater than the intrusiveness, the police response will be deemed lawful. Otherwise, it won't.

But, in addition to the abstract intrusiveness of the officers' response (or sometimes in place of it), the courts will focus more on whether the officers responded to the threat in a reasonable manner,[117] which essentially means that their response displayed a "sense of proportion."[118]

Officers are not, however, required to utilize the least intrusive means of defusing the emergency. As the Supreme Court explained, "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."[119] Furthermore, the courts have been cautioned to

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[115] *People v. Molnar* (N.Y. App. 2002) 774 N.E.2d 738, 741.

[116] (6th Cir. 1996) 98 F.3d 1506.

[117] See *Mincey v. Arizona* (1978) 437 U.S. 385, 393 ["[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation."]; *Thompson v. Louisiana* (1985) 469 U.S. 17, 22 ["Petitioner's call for help can hardly be seen as an invitation to the general public that would have converted her home into the sort of public place for which no warrant to search would be necessary."]; *People v. Gentry* (1992) 7 Cal.App.4th 1255, 1261, fn.2 ["The nature of the exigency defines the scope of the search"]; *Henderson v. Simi Valley* (9th Cir. 2002) 305 F.3d 1052, 1060 ["The officers' intrusion into the house was limited to those particular areas where entry was required to retrieve [the owner's daughter's] property. The officers played no active role in [the] court-ordered foray. They merely stood by to prevent a beach of the peace while the court's order was implemented."].

[118] *McDonald v. United States* (1948) 335 U.S. 451, 459. Also see *People v. Ray* (1999) 21 Cal.4th 464, 477 [the officers' conduct "must be carefully limited to achieving the objective which justified the entry"].

[119] *United States v. Sharpe* (1985) 470 U.S. 675, 686.

avoid second-guessing the officers' assessment of the need for immediate action so long as it was within the bounds of reasonableness. Thus, the California Court of Appeal observed, "Of course, from the security of our lofty perspective, and despite our total lack of practical experience in the field, we might question whether or not those who physically confronted the danger in this instance, selected the 'best' course of action available."[120]

Although it is not possible to rank the various police responses on an intrusiveness scale, there are some generalizations that can be made.

ENTERING A HOME: The most intrusive of the usual police responses to exigent circumstances is a forcible entry into a home. As the Supreme Court observed, "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[121] For this reason (as discussed earlier) the courts have consistently ruled that such an intrusive response can be justified only if the officers had probable cause to believe the threat would materialize.

Also note that, in addition to the physical entry, the courts will consider whether the officers gave notice of their identity and purpose beforehand. Again quoting the Supreme Court, "[T]he method of an officer's entry into a dwelling [is] among the factors to be considered."[122]

AFTER ENTRY: While a full search is permitted if it was reasonably necessary,[123] it is seldom necessary because most threats can be defused by conducting a "sweep" or "walk-through" to either locate a fleeing suspect or determine if there is anyone inside who needs help or who might destroy evidence. Then, if necessary, officers can secure the premises pending issuance of a warrant, whether by removing the occupants or preventing anyone from entering. For example, in *Segura v. United States* the Supreme Court pointed out that "[i]n this case, the agents entered and secured the apartment from within. Arguably, the wiser course would have been to depart immediately and secure the premises from the outside by a 'stakeout' once the security check revealed that no one other than those taken into custody were in the apartment. But the method actually employed does not require a different result."[124]

TRESPASSING: Merely walking on a suspect's property may constitute a technical search, but it is relatively nonintrusive, and will be deemed reasonable if the officers' entry was restricted to areas that needed to be checked in order to defuse the threat.[125] If there was reason to believe that an emergency existed inside a home, an officer's act of looking through windows from outside is also considered nonintrusive.[126]

MAKE SAFE: If the emergency resulted from a dangerous condition (e.g., a meth lab), officers may do those things that are reasonably necessary to eliminate the threat, including a search. As the Fourth Circuit observed, "The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope."[127]

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[120] *People v. Osuna* (1986) 187 Cal.App.3d 845, 855.Also see *San Francisco v. Sheehan* (2015) __ U.S. __ [135 S.Ct.1765, 1777].
[121] *Payton v. New York* (1980) 445 U.S. 573, 585.
[122] *Wilson v. Arkansas* (1995) 514 U.S. 927, 934.
[123] See *People v. Sirhan* (1972) 7 Cal.3d 710, 740 ["Only a thorough search in the house could insure that there was no evidence therein of such a conspiracy."]; *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 226 ["The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope."].
[124] (1984) 468 U.S. 796, 811. Also see *Illinois v. McArthur* (2001) 531 U.S. 326, 336 ["Temporarily keeping a person from entering his home is considerably less intrusive than police entry."]; *Mincey v. Arizona* (1978) 437 U.S. 385, 394 [any threat to the destruction of evidence was minimized because of "the police guard at the apartment"]; *People v. Bennett* (1998) 17 Cal.4th 373, 387.
[125] See *Florida v. Jardines* (2013) __ U.S. __ [133 S.Ct. 1409, 1415]; *People v. Lujano* (2014) 229 Cal.App.4th 175, 183-84; *People v. Gemmill* (2008) 162 Cal.App.4th 958, 970; *People v. Camacho* (2000) 23 Cal.4th 824, 836; *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 364.
[126] *People v. Gemmill* (2008) 162 Cal.App.4th 958, 971.
[127] *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 226.

SEARCHING CELL PHONES: Officers may access the contents of a cell phone without a warrant if they reasonably believed that immediate access was necessary to defuse an imminent danger of death or serious physical injury.[128] Otherwise, officers must seize the phone to protect it and its contents from destruction, then seek a warrant.[129]

Vacating and Reentry

Officers who have entered a home or business pursuant to exigent circumstances must leave within a reasonable amount of time after the threat to people, property, or evidence has been eliminated. As noted, however, they may secure the premises (i.e., temporarily "seize" it) pending the issuance of a search warrant if they reasonably believed they had probable cause for one.[130] Thus, officers must avoid what happened in the landmark case of *Mincey v. Arizona.*[131]

Here, an officer in Tucson was killed by a drug dealer when officers entered the suspect's apartment to execute a search warrant. After the premises were secured, officers supervised the removal of the officer's body and made sure that "the scene was disturbed as little as possible." These actions were plainly permissible. But then the officers "proceeded to gather evidence." In fact, they remained in the home for four days, during which time they "opened drawers, closets, and cupboards, and inspected their contents; they emptied clothing pockets; they dug bullet fragments out of the walls and floors; they pulled up sections of the carpet and removed them for examination." All told, they seized between 200 and 300 items.

In the Supreme Court, the government urged the Court to establish a "crime scene exception" to the warrant requirement or, at least, a "murder scene" exception. The Court refused. Although it acknowledged that the crime under investigation was exceptionally serious, and although the officers had probable cause for a warrant that could have authorized an intensive search, it ruled that "the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there."

When to vacate

Like most things involving exigent circumstances, there is no simple test to determine the point at which officers must stop and obtain court authorization for any further intrusion. So we will simply review a few examples of situations in which the courts addressed the issue.

EXPLOSIVES: The emergency created by the presence of explosives in a structure ended when the danger has been eliminated.[132]

DANGEROUS CHEMICALS: The emergency ended when the imminent danger of fire or explosion has been eliminated.[133]

STRUCTURE FIRES: The exigency caused by a residential or commercial structure fire does not automatically end when the fire is under control or even with the "dousing of the last flame."[134] Instead, it ends after investigators have determined the cause and origin of the fire,[135] and have determined that the premises were safe for re-occupancy.[136] The amount of time that is reasonably necessary for such purposes will depend

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[128] See Pen. Code § 1546.1(c)(6).
[129] See *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2486]; *U.S. v. Henry* (1st Cir. 2016) 827 F.3d 16, 27.
[130] See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32; *People v. Bennett* (1998) 17 Cal.4th 373, 386.
[131] (1978) 437 U.S. 385.
[132] See *People v. Remiro* (1979) 89 Cal.App.3d 809, 830-31.
[133] See *People v. Avalos* (1988) 203 Cal.App.3d 1517, 1523; *People v. Duncan* (1986) 42 Cal.3d 91, 105; *People v. Blackwell* (1983) 147 Cal.App.3d 646, 653; *People v. Abes* (1985) 174 Cal.App.3d 796, 807-9.
[134] *Michigan v. Tyler* (1978) 436 U.S. 499, 510.
[135] See *Michigan v. Tyler* (1978) 436 U.S. 499, 510; *Michigan v. Clifford* (1984) 464 U.S. 287, 293; *People v. Glance* (1989) 209 Cal.App.3d 836, 845 [officers may "remain for a reasonable time in order to ascertain the cause and origin of the blaze"].
[136] See *U.S. v. Buckmaster* (6th Cir. 2007) 485 F.3d 873, 876.

on the size of the structure; conditions that made the investigation more time-consuming, such as heavy smoke and poor lighting; and whether there were other circumstances that delayed the investigation, such as the presence of explosives or dangerous chemicals.[137] Still, a warrant will be required when investigators have concluded that the cause was arson and their purpose had shifted from finding the cause and origin to conducting a criminal investigation.[138]

SHOOTING INSIDE A RESIDENCE: The emergency created by a murder or non-fatal shooting in a residence ends after officers had determined there were no suspects or other victims on the scene, the victim had been removed, and there was no threat to evidence located inside.[139]

BARRICADED SUSPECT: The threat ends after the suspect was arrested and officers determined there were no victims or other suspects inside.[140]

BURGLARY IN PROGRESS: The emergency ends after officers arrested the burglar and had determined there were no accomplices on the premises, and that the residents were not in need of emergency aid.[141]

Reentry

After vacating the premises, officers may not reenter unless they have a search warrant or consent.[142] Exception: Officers may reenter for the limited purpose of seizing evidence if (1) they saw the evidence in plain view while they were lawfully inside; (2) due to exigent circumstances, it was impractical to seize the evidence before the emergency was neutralized; and (3) the officers had not yet surrendered their control of the premises.[143]

For example, in *People v. Superior Court (Quinn)*[144] an officer entered a house on grounds of hot pursuit. While looking for the suspect, he saw drugs which he did not seize because the suspect was still at large. Immediately after arresting the suspect and removing him from the premises, the officer reentered the residence and retrieved the drugs. Although the emergency was over when the officer reentered, the court ruled the reentry was lawful because the officer "did not trench upon any constitutionally protected interest by returning for the single purpose of retrieving contraband he had observed moments before in the bedroom but had not then been in a position to seize."

Similarly, in *Cleaver v. Superior Court* two men shot two officers in Oakland then, after a shootout, barricaded themselves in the basement of a home. About two hours later, officers launched a tear gas canister into the building, causing a fire.[145] One of the suspects was shot and killed as he fled; the other, Cleaver, was arrested. Evidence technicians were initially unable to enter the basement because of smoke and tear gas. But about three hours later one of them entered and seized some evidence but could not conduct a thorough search because of impaired visibility. About six hours later, an officer entered and recovered additional evidence.

In upholding both reentries, the California Supreme Court said, "The 11:30 P.M. search was thwarted by residual smoke, fumes and tear gas. The relatively short delays until 2 A.M. and 8 A.M. necessitated by darkness and continuing impaired visibility, cannot be deemed constitutionally improper or unreasonable under all the circumstances in this case." POV

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[137] See *Michigan v. Tyler* (1978) 436 U.S. 499, 510, fn.6; *People v. Avalos* (1988) 203 Cal.App.3d 1517, 1523 [meth lab.
[138] See *Michigan v. Clifford* (1984) 464 U.S. 287, 298, fn.9; *U.S. v. Rahman* (7th Cir. 2015) 805 F.3d 822, 833.
[139] See *People v. Amaya* (1979) 93 Cal.App.3d 424, 430-32; *People v. Boragno* (1991) 232 Cal.App.3d 378, 392.
[140] See *People v. Keener* (1983) 148 Cal.App.3d 73, 77.
[141] See *People v. Bradley* (1982) 132 Cal.App.3d 737.
[142] See *People v. Lucero* (1988) 44 Cal.3d 1006, 1018.
[143] See *San Francisco v. Sheehan* (2015) __ U.S. __ [135 S.Ct. 1765, 1775]; *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1014.
[144] (1978) 83 Cal.App.3d 609.
[145] (1979) 24 Cal.3d 297.

Questioning Minors

It is now the law in California that officers are prohibited from seeking *Miranda* waivers from minors who are 15-years old or younger unless they had consulted with an attorney. Furthermore, minors cannot waive this restriction. At the risk of stating the obvious, officers are now prohibited from interrogating all suspects who are 15 or younger, regardless of the seriousness of the crime under investigation, and regardless of the minor's intelligence, maturity, and sophistication.

This change in the law was codified in the Penal Code as section 625.6, and it went into effect on January 1, 2018. In this article, we will discuss this law and how it will likely be interpreted by the courts.

Why?

It is undisputed that minors are generally more likely than adults to feel intimidated when they are questioned by law enforcement officers. But it is also undisputed (at least to most people) that many of today's minors are as hardened and unintimidated by officers as the average resident of San Quentin. That is why, until now, it has been the law that, in determining whether a particular minor freely and voluntarily waived his *Miranda* rights (and also whether his subsequent statements were made voluntarily), the courts would consider the degree, if any, to which the officers pressured the minor; and also the degree to which the minor was vulnerable to such pressure.

Thus, like many of the decisions that judges must make, they were required to carefully consider a variety of circumstances that are unique to each case. For example, in addition taking into account the minor's chronological age, they would consider his maturity, sophistication, education, composure, experience with the criminal justice system, and whether the officers exploited any of the minor's personal vulnerabilities or those that are commonly associated with minority.

This is the way things were done for as long as we can remember, and there was nothing controversial about it. In fact, the importance of weighing these circumstances is so obvious in making determinations of this sort that the California Welfare and Institutions Code requires that they be considered in determining whether minors who are 14- and 15-years old can be tried as adults.[1] Among other things, it states that courts must consider the minor's "criminal sophistication," his "delinquent history," his "maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor's impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the minor's actions," and any other "relevant factor."

To summarize, it is now the law in California that minors who are 14 and 15 can be tried and punished as adults if the courts determine they are capable of reasoning and comprehending the seriousness of the crime under investigation and the consequences of committing it. But these same minors are incapable of comprehending the seriousness and consequences of waiving their *Miranda* rights.

Because this might seem irrational, it would be natural to wonder how the legislature reached its conclusion that California's law enforcement officers and judges have suddenly demonstrated an insensitivity to this issue, such that the matter needed to be taken out of their hands. The answer may be found in the statute's enabling legislation—Senate Bill 395—which states that a large body of academic research has established that "adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions." In plain language, this means that minors, like adults, will sometimes agree to speak with officers but they may later regret it.

[1] See Welf. & Inst. Code § 707(b).

Also in support of its decision to remove officers and judges from the process, the legislature cited some other academic studies as proving that minors "have a lesser ability as compared to adults to comprehend the meaning of their rights and the consequences of waiver." But there is nothing new in any of this Moreover, academics would be the first to admit that making these kinds of generalizations is unsound. As the Court of Appeal observed, "A presumption that all minors are incapable of a knowing, intelligent waiver of constitutional rights is a form of stereotyping that does not comport with the realities of everyday living."[2]

So why did the legislature pass a law that so obviously "does not comport with the realities of everyday living?" Maybe it is because of some other academic articles in which psychologists, sociologists, behavioral scientists, and special interest groups asserted that an epidemic of false confessions was sweeping the country, and that it was caused by widespread police misconduct. While some of these writers were advocating better training of officers and more awareness of the problem by the courts, others believed the problem was so widespread and insidious that officers could no longer be trusted to question minors who are 15 and younger. It appears the legislature agreed with the latter.

None of this should be interpreted to mean that the concerns behind the new law were unwarranted. Undoubtedly, the questioning of all minors requires both sensitivity and restraint. And sometimes this doesn't happen. For example, in the recent case of *In re T.F.*[3] an officer questioned a 15-year old who was suspected of committing a lewd act on a child. In ruling that the minor's confession should have been suppressed, the Court of Appeal cited the officer's "aggressive" interrogation tactics, the minor's "distraught" mental state, and the fact that the minor had a learning disability which resulted in an ability to read at only the fourth grade level. For virtually these same reasons, the Ninth Circuit in *Rodriguez v. McDonald* recently invalidated the confession of a minor because he was only 14, he had Attention Deficit Hyperactivity Disorder, a "borderline" IQ of 77, was academically a fourth or fifth grader, and his unambiguous invocation had been ignored by the officers who also suggested to him that the only way he could save his life was to talk with them.[4]

While cases such as these have been cited by some as support for the conclusion that minors should never be questioned by officers, they might also be cited as support for ability of probation officers, prosecutors, defense attorneys, juvenile court judges, trial court judges, appellate court justices, and even juries to weed out the errors and abuses that sometimes occur. Some will respond by saying that people make mistakes and that imperfection cannot be tolerated in making such life-changing decisions. We have heard this before and it has a certain, simple appeal. But imperfection is the natural result of having a system that is run by human beings. And unless the legislature wants to change that, imperfection is inevitable.

Although Penal Code section 625.6 is brief and relatively unambiguous, there are some things about it that should be noted.

Suppression issues

Section 625.6 does not technically require the courts to suppress statements obtained in violation. This is probably because the legislature is prohibited from enacting a suppression statute unless it was passed by at least a two-thirds vote. And that did not happen here. Nor can the legislature establish new *Miranda* rights (although it could be argued that it effectively did so here). For these reasons, the word "suppression" does not appear in section 625.6. But that was plainly its objective, as it specifically states officers cannot seek *Miranda* waivers from minors who are 15 or younger unless the minor has consulted with a lawyer. Because the legislature (and virtually everyone else) knows that any lawyer will instruct the

[2] *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72.
[3] (2017) 16 Cal.App.5th 202.
[4] (9th Cir. 2017) 872 F.3d 908.

minor not to speak with the officers, it effectively achieves suppression of any statement the minor might make by preventing him from making one.

Furthermore, in the event that an officer should happen to obtain a statement from a 14- or 15-year old, section 625.6 suggests that the courts should suppress it. Specifically, it requires that judges consider the violation in determining whether the statement is "admissible." In California, the admissibility of relevant evidence is governed primarily by Evidence Code section 352 which says that judges have the discretion to exclude it if its probative value is outweighed by its prejudicial effect. Thus, section 625.6 might be interpreted by some as establishing a conclusive and irrefutable presumption that statements taken in violation are inadmissible because they are excessively prejudicial with little, if any, probative value.[5]

"Custodial interrogation"

Section 625.6 states that its restrictions apply only to "custodial interrogation." Thus, officers may question 14- and 15-year olds who have not consulted with a lawyer if they are not "in custody" or if their questions do not constitute "interrogation."

While the statute does not define the term "custodial interrogation," it is virtually certain that the courts will apply the standard legal definition of the term as defined by the Supreme Court and as interpreted by the lower courts. The reasons for this conclusion are as follows:

(1) "Custodial interrogation" is a "term of art" that is intrinsically bound with *Miranda*.[6] As the Supreme Court observed, "It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation."[7] Or, as the California Supreme Court put it, "Absent 'custodial interrogation,' *Miranda* simply does not come into play."[8]

(2) The term "custodial interrogation" was employed in section 625.6 as delineating the point at which the restrictions pertaining to the questioning of minors 15 and younger go into effect. And that same term was employed by the Supreme Court in delineating the point at which officers must comply with the *Miranda* procedure.

(3) Although section 625.6 does not purport to establish new *Miranda* rights, it is firmly based on *Miranda*; e.g.: "Prior to a custodial interrogation, and before the waiver of any *Miranda* rights, a [minor 15 or younger] shall consult with legal counsel in person, by telephone, or by video conference."

(4) In writing section 625.6, the legislature did not think it was necessary to define the term "custodial interrogation." Thus, it seems apparent that it intended to incorporate the common legal definition of the term.

The question, then, is how do the courts define the terms "custody" and "interrogation."

"IN CUSTODY": A suspect is "in custody" for *Miranda* purposes if officers notified him that he was under arrest or if, based on the totality of circumstances, a reasonable person in his position would have believed that his freedom of action had been curtailed to the degree associated with a formal arrest.[9] As the Supreme Court explained in *Howes v. Fields*, "As used in our *Miranda* case law, 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion."[10]

What happens if the minor was in custody for one crime but officers wanted to interrogate him about

[5] **NOTE**: It is possible that some courts will continue to apply section 352 as it was intended; i.e., that judges use their discretion and weigh all of the relevant circumstances in making these calls which, in addition to the minor's chronological age and lack of legal advice, would include the circumstances referred to earlier, such as his maturity, sophistication, and experiences with the criminal justice system.

[6] *Howes v. Fields* (2012) 565 U.S. 499, 508-509.

[7] *Illinois v. Perkins* (1990) 496 U.S. 292, 297.

[8] *People v. Mickey* (1991) 54 Cal.3d 612, 648.

[9] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.

[10] (2012) 565 U.S. 499, 508-509. Also see *People v. Taylor* (1986) 178 Cal.App.3d 217, 228.

a crime for which he was not in custody? They are prohibited from doing so because, for *Miranda* purposes—and presumably for section 625.6 purposes—he is still "in custody."[11]

In *Miranda*, a minor may be deemed *not* "in custody" if officers notified him that he was not under arrest and was free to go.[12] This would also be a relevant circumstance in determining whether a minor was in custody for section 625.6 purposes, but it will have no effect if there were other circumstances that reasonably appeared otherwise.

What about questioning minors who are being detained? Although detainees know they are not free to leave or move about, they are seldom in custody for *Miranda* purposes because, unlike arrestees, they are presumed to know these restrictions are "transitory" and "comparatively nonthreatening."[13] A detention will, however, become custodial if the detainee was "subjected to treatment that rendered him 'in custody' for practical purposes"; e.g., the questioning had become "sustained and coercive."[14]

"INTERROGATION": "Interrogation" is defined as a question or statement that was reasonably likely to elicit an incriminating response. Said the Supreme Court, "[T]he definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."[15]

Exigent circumstances

The only other exemption from the restrictions imposed by section 625.6 is that officers may interrogate a minor in custody who has not consulted with a lawyer if (1) they reasonably believed that the information they were seeking was "necessary to protect life or property from an imminent threat," and (2) the officers' questions "were limited to those questions that were reasonably necessary to obtain that information."

Must officers find an attorney?

So long as the officers did not intend to interrogate the minor, there would be no need to provide him with one since the attorney's only purpose is to tell the minor not to talk to them.

Questioning 16- and 17-year olds

Question: Do the rules that prohibit interviews with 14- and 15-year olds also apply to 16- and 17-year olds? The obvious answer is "of course not" because that statute says otherwise. But there's more to the story.

The statute's enabling act advises judges and others who might read or cite it that studies have proven that *all* minors are "more vulnerable or susceptible to outside pressures than adults," that *all* minors have only a "limited understanding of the criminal justice system," and that *all* minors "have a lesser ability as compared to adults to comprehend the meaning of their rights and the consequences of waiving them." So, why does the bill make so many references to *all* minors if it only pertains to those who are 15 and younger?

One possibility is that the proponents actually wanted to prohibit officers from questioning *all* minors—including 16- and 17-year olds—but they could not muster the votes to do so. This seems especially plausible because of the likelihood that the voters would probably not understand why it is in the public interest to prevent the successful investigation and prosecution of many serious and violent crimes because the perpetrators happened to be young. This might also explain why the bill's supporters sought passage via the behind-the-scenes legislative route instead of giving the voters an opportunity to decide this matter via a statewide ballot initiative. But, then, that would have necessitated an open discussion of the consequences of the new law. POV

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[11] See *Michigan v. Mosley* (1975) 423 U.S. 96; *People v. Warner* (1988) 203 Cal.App.3d 1122, 1130.
[12] See *Oregon v. Mathiason* (1977) 429 U.S. 492, 495 ["[H]e was immediately informed that he was not under arrest."]; *California v. Beheler* (1983) 463 U.S. 1121, 1122 ["the police specifically told Beheler that he was not under arrest"];
[13] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 439-40; *People v. Clair* (1992) 2 Cal.4th 629, 679.
[14] *People v. Manis* (1969) 268 Cal.App.2d 653, 669.
[15] *Rhode Island v. Innis* (1980) 446 U.S. 291, 302. Also see *People v. Wader* (1993) 5 Cal.4th 610, 637.

Testifying in Court

What makes an officer an effective witness in court? That was the question we posed, in 1991, to several respected judges, prosecutors, defense attorneys, and officers. Some of them have since died, most of the others have retired. One sits on the Court of Appeal, and another sits on the California Supreme Court. Having decided to cover this subject again, we thought about revising it, maybe getting some new ideas. But, after giving it some thought, we decided against it. This was not because we thought the members of the original panel might have covered every conceivable quality of effective police witnesses. It was because we were certain they had.

Be Prepared

Everyone we interviewed stressed the importance of preparedness. Said an officer, "I think many of the problems with officers' testimony are caused by the officers themselves—they're just not prepared." The amount of preparation that is necessary will, of course, depend on the complexity and seriousness of the case and the importance of the officer's testimony. In murder cases, for example, a homicide detective said he routinely takes his case files home at least one week before trial and reviews everything. A robbery detective said he likes to study the file and "try to plan how to respond to questions I think will be asked. It's like chess: What move is the defense attorney going to make?"

At the very least, being prepared means carefully reading police reports because, as a prosecutor explained, "An officer can't be an effective witness unless he has a command of the facts in the report." Another officer added, "When you're reading your police report you don't want to memorize things like license plate numbers and quotes from the victim or the defendant. That sounds rehearsed. If somebody asks me to quote something, I refer to my report so the jury knows they're getting exactly what was said, not my best recollection."

Impartiality

An officer's testimony will have significantly greater weight if he or she demonstrates an impartial, unbiased attitude. Conversely, an officer's credibility will suffer if it appears that he or she has a personal interest in the outcome. This does not mean an officer should appear uninterested or passive. It simply means that the officer should convey the sense that his or her only interest is to present the facts. As one judge suggested, "Just state the facts and let the chips fall where they may." Another judge said, "Don't go into the courtroom carrying a torch or a spear. Just tell the truth. If an officer sticks to the truth, a defense attorney can cross-examine him until the building falls down, but he won't accomplish anything."

This means an effective police witness will answer each question truthfully, even if the answer might hurt the prosecution's case. Said a prosecutor, "If an officer fudges on something he thinks will hurt the case, it will probably come out from other witnesses. Then the officer's credibility is shot."

Treat the DA and defense attorney alike: An officer can also demonstrate impartiality by interacting with the defense attorney and prosecutor in the same manner. A DA's investigator noted that an officer will often appear friendly and relaxed when he or she is being questioned by the DA, "but then the cross-examination starts and he immediately becomes defensive. There may be a change in the tone of voice. He may move around in the chair, sort of squirming. This is body language. Don't do this. Speak to the defense attorney with the same demeanor and attitude as the DA." A judge agreed: "Some officers say 'Yes, sir' to the DA but with the defense attorney they say 'That is correct, counselor.' They are more stiff. And if the DA misstates something, the officer should correct him just as he would correct the defense attorney."

Don't be evasive: An officer's credibility may also be hurt if he or she attempts to avoid answering an unambiguous question. Judges and jurors

usually see this as an indication the officer has an interest in the outcome of the case, and that maybe the answer would help the defense. As a defense attorney explained, "If I'm trying to get an answer out of an officer and he won't give me one, he's doing me a favor." Another defense attorney said, "When an officer is evasive, he looks defensive. I will keep asking the question until I get a direct answer. I've asked the same question four times in a row. Eventually I'll get an answer, but it makes a bad impression when an officer won't answer a simple question."

DON'T VOLUNTEER INFORMATION: Just as an attempt to avoid answering a question may hurt an officer's credibility, an attempt to volunteer information may also indicate that the officer is trying to "help" the prosecution. According to a defense attorney, "An effective police witness just answers the questions and gets out. He doesn't get into long explanations. I like to think that when an officer goes beyond what is asked, I can win. I can accomplish something. It also makes it look like he's not neutral. If I think an officer is susceptible to volunteering information, I'll take him on, try to impugn his credibility."

DON'T GET ANGRY: There are two reasons that officers should not demonstrate anger toward the defense attorney. First, the officer's image as an impartial witness will be damaged. Second, the officer's anger may make it difficult for him to think clearly and to respond effectively to the attorney's questions. On the other hand, if the officer successfully resists the impulse to demonstrate anger—no matter how obnoxious the defense attorney—the officer's image as a professional will be strengthened. Poise and self-control are qualities that judges and jurors like to see in an officer.

Note that some defense attorneys will *try* to get officers angry on the witness stand. In the words of a judge, "Don't ever get angry with a defense attorney. They're doing this for a purpose. They're trying to bait you." Said another judge, "When an attorney is making you mad, don't give in. He's going to manipulate you by building on your emotions. Your anger will keep you from thinking clearly. If he can get your goat, he's winning. But if he gets angry and you don't, you really win."

Officers should also never become sarcastic or irritable. "Where officers get into trouble," said a judge, "is when they start answering a defense attorney by saying something like, 'Of course I did,' or 'As I already told you . . . .'" Another judge warned, "If an officer gets smart, I let the attorney go at him. But if the officer keeps his dignity, I'll tell the attorney to be civil, or there will be hell to pay."

"I DON'T KNOW": An officer who does not know the answer to a questions should say so. There is nothing wrong with answering "I don't know," or "I can't remember." As a judge explained, "Some officers I don't trust. Others I tend to trust because they've said 'I don't know' or 'I didn't see it." A prosecutor put it this way: "There's a myth that an officer on the stand has to answer every question, has to know everything." A defense attorney agreed, saying, "I remember a case where there had been a lot of muggings in a park so this officer was sent in as a decoy, dressed like a bum. He was leaning against a tree when my client grabbed a $20 bill from his pocket. I didn't have much of a defense, so at the trial I asked him, 'You say you were leaning against a tree. *What kind of tree was it?* It didn't make any difference, of course, but instead of just saying 'I don't know,' he became totally unglued and stammered, "It . . . it . . . it was a *wooden* tree!"

I DON'T UNDERSTAND THE QUESTION: Attorneys frequently ask confusing questions. Sometimes they do this on purpose to try to confuse the witness. An inspector pointed out that some officers don't like to say they do not understand a question because "they think it sounds foolish. They're concerned that the attorney will belittle them. But it's still better to say 'I don't understand' than try to guess. Besides, the jurors probably didn't understand the question either, so the attorney's attempt to belittle the officer will probably backfire."

Avoiding Traps

There are various ways that defense attorneys may try to reduce an officer's effectiveness as a witness. Here are some common tactics:

CROSS-EXAMINATION ABOUT POLICE REPORTS: Sometimes there are inconsistencies between an officer's testimony in court and what he wrote in his police report. Or the officer may testify about something

that he did not include in his report. Defense attorneys commonly point out such inconsistencies in an attempt to create doubt about an officer's testimony. When this happens, do not become defensive. If there was an error, simply acknowledge it. As an inspector observed, "One of the hardest things for officers is to admit a mistake. Why? One reason is they're afraid that jurors or the judge won't believe anything they say. But everyone makes mistakes. It's only human." A defense attorney put it this way, "All important facts should be in the police report. If not, it may look like the officer is inventing it. If something was omitted which turned out to be important, be humble. 'I screwed up.' But as a defense attorney, I'd rather have the officer try to cover up, to patch it up somehow."

REPEATED QUESTIONS: An attorney may try to cause an officer to give an inconsistent answer by asking the same question several times. As an inspector observed, "Some attorneys will ask a question three or four times. Essentially it's the same question but there's a little change in the language. They're trying to get a 'yes' answer to a question which was previously answered 'no.' You've got to pay attention.

SUMMARIZING PREVIOUS TESTIMONY: Officers should be especially alert when a defense attorney asks a question in which he or she summarizes the officer's previous testimony; e.g., "Earlier you testified that . . . ." The danger here is that the attorney may deliberately or negligently misstate the officer's testimony. Said a prosecutor, "A defense attorney will sometimes paraphrase what the officer said earlier, but it's somewhat incorrect. So listen carefully and, if he misstates it, say, 'That's not exactly what I said.' Don't think, 'Well, that's close enough.'"

An officer remembered a suppression hearing during which he testified that he stopped the defendant's car because it matched the description of a getaway car in a robbery. "I testified," said the officer, "that I stopped the car because it was a Cadillac and it was blue with a red stripe. On cross-examination the defense attorney said, 'You testified you stopped my client because he was riding in a blue car.' I responded, 'That's not what I said.'"

DID YOU TALK TO THE DA? Some defense attorneys routinely ask officers if they talked to the DA or other officers involved in the case before testifying in court. Usually, the purpose of the question is to suggest that the officer was coached by the DA or met with the other officers "to get their stories straight." When an officer is asked such a question, it is important not to get defensive. There is nothing wrong with talking to the DA and other officers before testifying. Prosecutors are *supposed* to talk with officers before going to court, and it is only natural for officers to talk amongst themselves about their cases and their experiences. So if the answer is yes, say so and do not feel as if you need to provide an explanation or excuse. According to a defense attorney, "It's okay to talk to the prosecutor and other officers about the case before testifying. There's nothing sinister about it. Might as well say so; the ceiling won't crash in. Sometimes it's significant. But mostly it's not."

Officers should, however, be careful if they are asked whether they talked to the DA or other officers "about your testimony," or "about how you are going to testify. These questions are different because a yes answer is more likely to be interpreted as an indication the testimony was rehearsed. Consequently, a prosecutor advised, "Don't fall for that trap, 'Did you talk to the DA about your testimony?' One way to answer that question is, 'If you're asking whether we talked about *how* I was going to testify, the answer is no.'" An officer explained, "When I'm asked whether I talked to the DA or other officers about my testimony, I usually say something like, 'We didn't talk about how I was going to testify. We talked about the facts of the case.'"

REFRESHING YOUR MEMORY: If an officer does not know the answer to a question because he forgot it, he or she may be permitted to review the police report if the officer thinks it would refresh his memory. Officers should not, however, simply start reading the police report whenever the answer to a question might be found there. Instead, ask for permission from either the judge or the attorney who asked the question: "May I refer to my police report?"

Plain English

There is hardly anything that turns off a judge or jury as much as hearing an officer speak in that stuffy, military-type style that has unfortunately become associated with law enforcement. This style of speaking is characterized by the use of words and phrases that are unnatural and overly formal in place of words and phrases that are simple and direct. Some examples:

"I exited my patrol vehicle." (I got out of my car.)
"I proceeded northbound." (I went north.)
"I effectuated a right turn." (I turned right.)
"I entered the residence." (I went inside.)
"That is correct." (Yes.)

Some other examples were cited in a case from the Ninth Circuit:

> The agents involved speak an almost impenetrable jargon. They do not get into their cars; they enter government vehicles. They do not get out of or leave their cars, they exit them. They do not go somewhere; they proceed. They do not go to a particular place; they proceed to its vicinity. They do not watch or look; they surveille. They never see anything; they observe it. No one tells them anything; they are advised. A person does not tell them his name; he identifies himself. A person does not say something; he indicates. They do not listen to a telephone conversation; they monitor it. An agent does not hand money to an informer to make a buy; he advances previously recorded official government funds. An agent does not say what an exhibit is; he says that it purports to be. The agents preface answers to simple and direct questions with 'to my knowledge.' They cannot describe a conversation by saying 'he said' and 'I said'; they speak in conclusions.

Testifying like this causes problems because it makes the officer appear cold and overbearing. "This type of language sets up a barrier between the officers and the jurors," said a judge. "What you really want is to convince the jury you are just like the guy who lives next door." Another judge said, "It helps if an officer is relaxed on the stand, talking like a real human being. Jurors don't warm up to officers who talk in this strange language." A prosecutor pointed out, "That stilted language causes jurors to concentrate on the phrasing of the officer's testimony rather than the testimony itself." An officer put it this way, "Police jargon is fine for TV and movies. But when accuracy is important, when you want to communicate with judges and jurors, it's terrible."

Other Suggestions

Here are some miscellaneous suggestions that were mentioned by the people we interviewed:

- "When the court clerk asks you to state your name, just state your name. Don't give your title and don't spell your name until the clerk asks you to. 'Officer John Doe, D-O-E.' It sounds showy, and makes the officer appear self-important."
- "Appear interested in the questions as opposed to just saying 'yes' or 'no' in a flat monotone. Make your testimony come alive for the jury."
- "Don't lounge in the chair. Sit straight or lean slightly forward. It shows you're interested. And don't act cocky."
- "Don't worry when you can't figure out what the defense attorney is trying to accomplish on cross-examination. A lot of them are asking questions which are really meaningless. They're doing it for affect or because they don't know how to cross-examine a witness. Meanwhile, the officer is worrying, 'What's going on here? What's he up to?'"
- "Don't make statements that are merely conclusions like 'I had probable cause' or 'He didn't see me.' Instead, give the facts that caused you to reach this conclusion like 'I believed I had probable cause because . . . .' or 'I don't think he saw me because . . . . "
- "It's okay to be nervous. I've been a cop for 20 years and I still get nervous. It gives you a competitive edge, gets the adrenaline going."
- "There's nothing wrong with having a sense of humor in court. Let the jury know you're human. It's okay to laugh at yourself." POV

Recent Cases

U.S. v. Orth

(1st Cir 2017) 873 F.3d 349

Issue

Did an officer have sufficient grounds to pat search a passenger in a vehicle that had been stopped for a traffic violation?

Facts

At about 10:30 P.M. an officer in New Hampshire stopped a car because it appeared the driver was impaired. There were three men in the car and, as the officer approached, two of them stared back at him like "deer-in-the-headlights." The officer asked the driver for his license and registration and he handed over his license but refused to even look for his registration. The officer then noticed that the front seat passenger, Robert Orth, was holding a "large black" cylindrical object between his legs. The officer asked the driver to identify the object but, once again, he did not respond. Orth, however, responded by becoming "noticeably aggressive verbally towards [the officer] saying 'It's a fucking flashlight.'" When asked the purpose of the flashlight, the driver said, "for sport."

At this point, the officer called for backup and told the driver to step out of the car. He also ordered Orth to put his hands on the dashboard. Orth refused and continued to shout obscenities at the officer, although he eventually complied. When the driver claimed he was not carrying any weapons, the officer pat searched him and found a large utility knife which he claimed he used in construction work. Just then, Orth, still shouting, took his hands off of the dashboard and reached toward the floorboard. The officer ordered him to put his hands back on the dashboard and Orth "reluctantly" complied.

When backup arrived, the officer ordered Orth out of the vehicle, pat searched him (finding nothing), and ordered him to stand away from the car because he was going to search it. Orth responded by stepping toward the officer, informing him he could not search the car, then pushing the officer in his chest and trying to close the car door. The officer told Orth that he was under arrest and Orth yelled to his friends to "get the shit, get the shit, run and hide it." In response, the driver reached toward the floorboard, grabbed a jacket, and ran off with it. It appears the driver was apprehended but, in any event, he dropped the jacket as he fled. Inside, the officer found a loaded pistol, a digital scale, and 248 grams of heroin.

Orth was charged with possession of heroin with intent to distribute, possession of a firearm in furtherance of drug trafficking, and possession of a firearm by a prohibited person. He filed a motion to suppress the evidence and the motion was denied. He pled guilty to all charges and was sentenced to ten years in prison.

Discussion

On appeal, Orth argued that the evidence should have been suppressed because the lawful traffic stop became an unlawful detention when the officer, without grounds to do so, ordered him to exit and said he was going to pat search him. At the outset, the court pointed out that "the circumstances and unfolding events during a traffic stop allow for an officer to shift his focus and increase the scope of his investigation by degrees with the accumulation of information." And that is what happened here because, based on the behavior or Orth and the driver, the focus of the stop shifted almost immediately from a DUI investigation to maintaining officer safety.

As for ordering Orth to exit, this was clearly lawful because the Supreme Court has ruled that officers who are conducting traffic stops need no justification for doing so.[1] (And even if some justification were required, it certainly existed here.)

[1] *Maryland v. Wilson* (1997) 519 U.S. 408, 415. Also see *People v. Lomax* (2010) 49 Cal.4th 530, 564.

As for the pat search, it is settled that officers may pat search a detainee if they reasonably believed he was armed or dangerous.[2] Because all passengers in a stopped car are effectively—and legally—"detained" through the duration of the stop,[3] the only issue was whether the officer reasonably believed that Orth was armed or dangerous. The answer was an unqualified yes for two reasons.

First, a detainee may be pat searched if he was aggressive or uncooperative.[4] Orth qualified on both counts when, among other things, he became verbally aggressive when the officer asked about the cylindrical object and suddenly reached toward the floorboard. Adding to the dangerousness of the situation, the driver of the car had refused to look for his vehicle registration and was carrying a large knife. These facts, said the court, provided the officer with "more than adequate reasonable suspicion to pat-frisk [Orth]."

Second, officers may also pat search a detainee if they reasonably believed he possessed an object that was being used as a weapon; i.e., a so-called "virtual weapon." In this case, the court ruled the officer's belief that the cylindrical object was a virtual weapon was reasonable because of Orth's "odd response" to the officer's question about it (it was used "for sport") and that Orth was holding it at the ready between his legs.

Consequently, the court rejected Orth's argument that the pistol, digital scale, and heroin should have been suppressed.

Comment

In a similar case in California, the Court of Appeal ruled that "a long black metal object," similar to a Mag flashlight, constituted a virtual weapon because it was "located approximately nine inches from defendant's left hand in his truck."[5]

Also note that in *Orth*, as in many other cases, the courts have said that pat searches are permitted only if officers reasonably believed that the suspect was "armed *and* dangerous." And although the Supreme Court has used the "armed and dangerous" language in some of its cases,[6] the lower courts have consistently—and logically—ruled that either one will suffice. As the California Court of Appeal explained, "[A] pat-down search for weapons may be made predicated on specific facts and circumstances giving the officer reasonable grounds to believe that defendant is armed *or* on other factors creating a potential for danger to the officers."[7]

U.S. v. Gorman

(9th Cir. 2017) 859 F.3d 706

Issue

Under what circumstances is a pretext traffic stop unlawful?

Facts

A Nevada Highway Patrol trooper made a traffic stop on a motorhome because the driver, while attempting unsuccessfully to pass a truck, caused traffic behind him to back up. In response to the trooper's inquiries, the driver, Straughn Gorman, said several things that the trooper believed were indications that Gorman was transporting drugs or drug money. It was apparent, however, that none of these things, individually or in combination, supported this conclusion.[8]

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[2] See *Florida v. Royer* (1983) 460 U.S. 491, 500 ["carefully tailored"]; *People v. Gentry* (1992) 7 Cal.App.4th 1225, 1267 ["focused"].
[3] See *Brendlin v. California* (2007) 551 U.S. 249; *Arizona v. Johnson* (2009) 555 U.S. 323, 332.
[4] See *People v. Mendoza* (2012) 52 Cal.4th 1056, 1082; *People v. Rios* (2011) 193 Cal.App.4th 584, 599.
[5] *People v. Avila* (1997) 58 Cal.App.4th 1069, 1074. Also see *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433; *People v. Methey* (1991) 227 Cal.App.3d 349, 358 [detainee was carrying a pry bar].
[6] See, for example, *Terry v. Ohio* (1968) 392 US 1.
[7] *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956. Emphasis added. Also see *Michigan v. Long* (1983) 463 U.S. 1032, 1049 ["the protection of police and others can justify protective searches when police have a reasonable belief that the suspect *poses a danger*"; emphasis added.
[8] **NOTE**: Specifically, Gorman referred to his girlfriend as a "chick" which the trooper thought was suspicious because Gorman was not a young man; Gorman said he was moving to Northern California but had also said he was going to live there; Northern California is a place "known for marijuana cultivation"; he said he sold paddleboards for a living but this sounded "rehearsed" plus it was "puzzling" that a paddleboard salesman could afford to drive cross-country in a motorhome.

After determining that Gorman was not wanted on an arrest warrant and that a drug-detecting K9 was not available, the trooper checked a database that compared Gorman's home address with residences that had been connected to drug trafficking by the DEA. The result was negative, so the trooper released Gorman without a citation. However, he immediately telephoned a K9 officer in a city located along Gorman's travel route and told him about his suspicions.

Less than an hour later, the officer, who had been watching for Gorman along the highway, spotted the motorhome and stopped it because Gorman had driven across the fog line three times. While waiting for the results of another records check (again, negative), the officer asked Gorman if he was "opposed to a canine assessment" of his motorhome. Gorman replied that he *was* opposed to it "if that *means* anything." It didn't, so the officer walked his K9 around the motorhome and the dog alerted to the right rear fender and cargo area. Based on the alert, the officer obtained a warrant to search the motorhome and found $167,000 in cash, plus pay/owe sheets.

Prosecutors declined to file charges against Gorman, but they did file a motion to seize the money. The District Court, however, denied the motion ruling that, even if the second stop was lawful, it was "inextricably connected" to the first stop which was not. The District Court also ordered the government to return Gorman's money and pay his attorney fees. The government appealed to the Ninth Circuit.

Discussion

A traffic stop, like any other detention, becomes an illegal de facto arrest if officers do not carry out their duties promptly and in a reasonable manner.[9] This means that, unless there was some legal justification for investigating another matter, officers must terminate the traffic stop within a reasonable time after completing their duties pertaining to the violation. As the Supreme Court put it, traffic stops must be "carefully tailored" to this objective.[10]

For these reasons, it was obvious that the first traffic stop of Gorman was unlawful almost from the start because, as noted, most of the trooper's questions were unrelated to the traffic violation, and the detention lasted much too long. Nevertheless, the government argued that the money seized during the second stop was subject to forfeiture because, unlike the first stop, the second one was not quite so lengthy and unfocused. The court said it did not share the government's view, especially because most the officer's questions duplicated those of the trooper and were therefore unnecessary.

In any event, the court was not required to decide the validity of the second stop because it ruled that, even if it was carried out in a reasonable manner, it was so closely related to the first (illegal) stop that it was essentially a mere continuation of it. In the law, this is known as the "fruit of the poisonous tree" rule by which evidence may be suppressed if it was the product or "fruit" of an illegal search or seizure. On the other hand, evidence will not be suppressed if the link between it and the officer's misconduct was sufficiently weakened or attenuated so as "to remove the 'taint' imposed upon that evidence by the original illegality."[11] Applying this test, the court observed that first and second stops were separated by less than an hour and "there were no intervening circumstances that might purge the taint." Consequently, it upheld the District Court's ruling that the money was seized illegally.

Comment

The government had argued that Gorman's commission of a second traffic violation did, in fact, constitute an independent intervening circumstance that broke the chain of causation between the first

[9] See *Hayes v. Florida* (1985) 470 U.S. 811, 815-16 ["at some point in the investigative process, police procedures can qualitatively and quantitatively become intrusive with respect to a suspect's freedom of movement and privacy interests as to [require probable cause]"]; *People v. Russell* (2000) 81 Cal.App.4th 96, 101.

[10] See *Florida v. Royer* (1983) 460 U.S. 491, 500 [must be "carefully tailored"]; *People v. Gentry* (1992) 7 Cal.App.4th 1225, 1267 [must be "focused"].

[11] *United States v. Crews* (1980) 445 U.S. 463, 471. Also see *People v. Richards* (1977) 72 Cal.App.3d 510, 514 ["An illegal arrest, alone, is utterly irrelevant. All that matters is whether the illegal arrest resulted in tainted evidence."].

and second stops. This was a logical argument because many courts have ruled that a defendant's commission of a new crime between the Fourth Amendment violation and the discovery of evidence does, in fact, constitute an independent intervening act.[12] But the court rejected it because, unlike the commission of a felony or a misdemeanor, Gorman's brief fog line violation was "trivial." Moreover, the court was not in the mood to be so forgiving, as indicated by its conclusion that the conduct of the officers constituted "a single integrated effort by police to circumvent the Constitution by making two coordinated stops."

People v. Parker

(2017) 2 Cal.5th 1184

Issues

Did a serial murderer waive his *Miranda* rights? Did he later invoke them?

Facts

In 1978 and 1979, Parker raped and brutally beat six woman during home invasions in the Orange County cities of Anaheim, Costa Mesa, and Tustin. Five of the woman were killed. The crimes went unsolved until 1996 when DNA testing linked Parker to all of the crimes. Having learned that Parker was currently at Avenal State Prison on a parole violation, detectives from Costa Mesa and Tustin went there to question him.

The first interview was conducted by two Costa Mesa detectives who advised Parker of his rights and informed him that his DNA "came up on a couple of Costa Mesa homicides back in 1979." When asked if he wanted to talk about it, Parker said, "I can't imagine why I would want to talk with the Costa Mesa Police Department," and "Why would I want to talk to you about something that occurred back then?" After explaining the significance of the DNA hit, one of the detectives urged Parker to confess. Parker responded by saying "the day is not today" and "I think I should wait until later on." He then suggested that the detectives visit him when he was transferred to the Orange County Jail in three weeks.

Before the detectives left the room, they told Parker that a Tustin detective was present and he also wanted to talk with him. Parker did not object so, after obtaining an express waiver, the Tustin detective questioned him about the Tustin murder. As things progressed, Parker said it was "possible" that he had killed someone in Tustin because he sometimes "blacked out" and would do things he did not remember. The detective urged Parker to "do the right thing" and talk to him about it. Parker responded by asking "Is Costa Mesa still here?" The detective said yes, and Parker said "then we can get this over with." During the interviews that followed with the three detectives, Parker confessed to all of the crimes. He was convicted and sentenced to death.

Discussion

On appeal, Parker argued that his confessions should have been suppressed because they were obtained in violation of *Miranda*. The California Supreme Court disagreed.

ALLEGED INVOCATION #1? Parker claimed that he had invoked his right to remain silent at the outset when he said, "I can't imagine why I would want to talk with the Costa Mesa Police Department?" and "Why would I want to talk to you about something that occurred back then?" He also contended that these questions were rhetorical and are commonly understood as meaning "no." It is settled, however, that a suspect's words can constitute a *Miranda* invocation only if they clearly and unambiguously demonstrated an intent to immediately invoke.[13] That did not happen here, said the court, because, "Taken in context, [Parker's] statement was reasonably understood as seeking to clarify why the Costa Mesa detective and investigator wished to speak

[12] See *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1262 ["An individual's decision to commit a new and distinct crime, even if made during or immediately after an unlawful detention, is an intervening act"]; *People v. Cox* (2008) 168 Cal.App.4th 702, 712 ["[D]efendant chose of his own free will to resist and impede [the officer's] search, and then chose to flee. Both of these choices were independent, intervening acts"].

[13] See *Davis v. United States* (1994) 512 U.S. 452, 459; *People v. Stitely* (2005) 35 Cal.4th 514, 535 ["the suspect must *unambiguously* assert his right to silence or counsel"].

with him, rather than as an invocation of the right to remain silent."

WAIVER OF RIGHTS? Next, Parker argued that the detectives violated his *Miranda* rights because, although he expressly told them that he understood his rights, they did not ask him if he wanted to waive them. However, as the court pointed out, an express waiver is not required. "It is well settled," said the court, "that law enforcement officers are not required to obtain an express waiver of a suspect's *Miranda* rights prior to a custodial interview and that a valid waiver of such rights may be implied from the defendant's words and actions." It then ruled that Parker's words and actions constituted an implied waiver because he actively participated in the interview by asking questions of the detectives and asking them to clarify certain things.

ALLEGED INVOCATION #2: Finally, Parker argued that, even if he impliedly waived his rights at the start, he had invoked them just before the interview with the Tustin detective, when he told the Costa Mesa detectives that "I think I should wait [to talk with you] until later on." But the court interpreted this as a limited invocation pertaining only to further questioning by the Costa Mesa detectives, especially because he made no objection when he was informed that the Tustin detective wanted to talk with him and he expressly waived his rights before talking with the Tustin detective.

For these reasons, the court ruled that the detectives did not violate Parker's *Miranda* rights, and it affirmed his conviction and death sentence.

People v. Wallace

(2017) 15 Cal.App.5th 82

Issue

Did the search of the defendant's car constitute a lawful inventory search?

Facts

An officer in Fairfield heard another officer report over the police radio that he was making a traffic stop on Leroy Wallace. The officer was aware that Wallace was wanted for a domestic violence incident that had occurred a night or two earlier, so he went to the scene of the stop and arrested him. After placing him in handcuffs, the officer searched his car and, as he entered, saw a red handle sticking up between the center console and the driver's seat. So he pulled it out and discovered it was the handle of a 24-inch long wooden billy club. Wallace was charged with possession of a billy club in violation of Penal Code section 22210 and, when his motion to suppress the club was denied, he pled guilty, but appealed the ruling.

Discussion

Unlike investigative vehicle searches whose objective is to find evidence of a crime, vehicle inventory searches are classified as "community caretaking" searches because their main purposes are to (1) provide a record of the property inside the vehicle so as to furnish the owner with an accounting; (2) protect officers and their departments from false claims that property inside was lost, stolen, or damaged; and (3) protect officers and others from harm if the vehicle contained a dangerous device or substance.[14] To make sure that inventories are conducted for this purpose, and this purpose only, the courts have established the following requirements:

(1) TOWING WAS NECESSARY: It must have been reasonably necessary to tow the vehicle under the circumstances.

(2) STANDARD PROCEDURES: The scope and intensity of the search must have been reasonable and in accordance with standard procedures.[15]

The question then, was whether these requirements were satisfied.

WAS TOWING NECESSARY? The officer testified that his department's policy "required officers to have a vehicle towed and inventoried when no one was present to take custody of it." Although the officer explained this, and while he testified that there were no passengers in the vehicle who could have taken possession of it, the court was not convinced that towing was necessary because there was no testimony as to *why* the car could not be left at the scene

[14] See *Whren v. United States* (1996) 517 U.S. 806, 811, fn.1; *People v. Scigliano* (1987) 196 Cal.App.3d 26, 29.
[15] See *Cady v. Dombrowski* (1973) 413 U.S. 433; *Colorado v. Bertine* (1987) 479 U.S. 367.

because, for example, the car was "located in a high crime area, illegally parked or otherwise posed a hazard to motorists or pedestrians." Furthermore, the court said the officer did not testify that he decided to have defendant's vehicle towed before he searched it, or even that the vehicle had eventually been towed. "Given the absence of this evidence," said the court, there is "no basis for inferring that [the search] was undertaken for the purpose of preparing an inventory."

STANDARD PROCEDURES: The court also thought that there was insufficient proof at the hearing that the search itself was conducted in accordance with standard procedures. The Supreme Court has explained that the purpose of this requirement is to help make sure that inventory searches are not a ruse "for a general rummaging in order to discover incriminating evidence." The Court added that "[t]he policy or practice governing inventory searches should be designed to produce an inventory. [Officers] must not be allowed so much latitude that inventory searches are turned into purposeful and general means of discovering evidence of crime."[16]

It seems that there was, in fact, reason to believe that the scope and intensity of the search in *Wallace* was conducted pursuant to standard procedures. For example, the officer testified that his department requires that officers search in places where "high value" items might be found in order to list them on the inventory form and to make sure they are taken into custody for safekeeping. He also testified that it was his department's policy that officers conduct the search in accordance with the CHP 180 form whose purpose, as the California Supreme Court noted, is "to preserve a record of the physical condition of the vehicle and its contents."[17]

The court, however, ruled there was insufficient evidence of a standardized search because the officer testified he "had nothing to do" with filling out the CHP 180 form, that he "did not testify that he was complying with [the CHP 180 form's requirements] when he searched defendant's vehicle," and he did not even know whether the other officer did so. Consequently, the court ruled that the billy club should have been suppressed.

Comment

It might be questioned whether the court's doubts about the need to tow the vehicle and its conclusion that the search was not conducted in accordance with standardized procedures were well-founded or whether the court was engaging in a hypertechnical analysis of these things. It appears that the Attorney General's Office had concluded that the court's objections were valid because it did not defend the search as a lawful inventory search. Instead, it argued that the evidence was admissible under the theory of inevitable discovery, which the court also rejected. In any event, we decided to report on *Wallace* because it provides a good discussion of the main legal issues pertaining to vehicle inventory searches. POV

[16] *Florida v. Wells* (1990) 495 U.S. 1, 4. Also see *Colorado v. Bertine* (1987) 479 U.S. 367, 374, fn.6 ["Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria."]; *People v. Williams* (1999) 20 Cal.4th 119, 127 ["the record must at least indicate that police were following some standardized criteria or established routine when they elected to open the containers"].

[17] *People v. Williams* (1999) 20 Cal.4th 119, 123.

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